Supreme Court, U.S.
FILED

091250 MAR 23 2010

OFFICE OF THE CLERK

Case No. 09-

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD I. FINE,
Petitioner,

v.

SHERIFF OF LOS ANGELES COUNTY,
Respondent.

On Petition for Writ of Habeas Corpus
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

RICHARD I. FINE
In Pro Per
Prisoner ID 1824367
c/o Men's Central Jail
441 Bauchet Street
Los Angeles, CA 90012
(310) 638-2825 (messages)
Email:
RichardIFine@gmail.com

Opposing Counsels' Email:
Unknown

Judges for the Superior Court of Los Angeles County, who are state-elected, began receiving substantial monies, mischaracterized as "judicial benefits", from L.A. County in the late 1980s. LA County began winning virtually all lawsuits filed against it when the same were decided by judges and not juries. The payments were found to be unconstitutional in October 2008. The California Legislature subsequently passed Senate Bill SBX2-11, which retroactively granted immunity from criminal prosecution for the estimated ten million felonies committed, while purportedly authorizing the payments.

Meanwhile, a homeowners association had sued L.A. County and others concerning an environmental impact report and County Supervisors' illegal votes approving same. The judge, refusing to recuse himself despite having received almost $100,000 from a defendant in the case, ultimately ruled in defendants' favor. Appellate judges then knowingly misconstrued the facts and protected the trial judge.

Question Presented for Review:

Whether the trial court judge should have recused himself in the case of *Marina Strand Colony II Homeowners Association v. County of Los Angeles*, Los Angeles Superior Court case No. BS109420, in which the judge received illegal payments from the County of Los Angeles, a party to the case; and whether he should also have recused himself in the ancillary contempt proceeding in which he "judged his own actions."

Parties and Rule 29.6

All parties to the proceedings are named in the Caption to the case. The Real Parties in Interest are the Superior Court of the State of California for the County of Los Angeles and Superior Court Judge David P. Yaffe.

No *Corporate Rule 29.6* statement is required as there are no corporations involved.

Table of Contents

	Page
Question Presented for Review	i
Parties and Rule 29.6	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of Issues	2
Standard of Review	3
Summary of the Case	3
A. Introduction	3
B. L.A. County and L.A. Superior Court judge knew that the L.A. County payments were illegal from the beginning	11
C. The Actions of the State Court Trial Judge, David P. Yaffe	15
Reasons for Granting Writ	24
1. Recusal was mandated because the L.A. County payments violated due process	26
2. Recusal was mandated because the trial judge was "embroiled" with Petitioner	33
3. Recusal was mandated because the trial judge "judged his own actions" in the contempt proceeding	34
Conclusion	36

Appendix:

1. Memorandum of Decision, entered by Ninth Circuit panel on December 16, 2009 A1

2. Report And Recommendation Of United States Magistrate Judge A4

3. Order Accepting Report and Recommendation of United States Magistrate Judge A34

4. Order Denying Petition for Rehearing and En Banc Hearing, entered by Ninth Circuit panel on February 10, 2010 A36

5. Objections, Including Memorandum In Support Of Objections, To Magistrate Judge's Report; Demand for Immediate Release A37

6. California Senate Bill SBX2-11, enacted February 20, 2009, effective May 21, 2009 A54

Table of Authorities

Cases

	Page
Aetna Life Ins. Co. v. Lavoie, 475 U.S. 815 (1986)	6, 28, 29
Caperton v. A.T. Massey Coal Co., Inc., 566 U.S. ___ (2009)	Passim
County of Madera v. Superior Court, 39 Cal.App.3d 665 (1974)	12
Crater v. Galaza, 49 F.3d 1119, 1132 (9th Cir. 2007)	34
Fine v. State Bar of California, et al, USDC case no. CV-10-0048 JFW(CW)	8
Fine v. Superior Court, 97 Cal.App.4th 651 (2002)	7
Marina Strand Colony II Homeowners Assn v. County of L.A., LASC case no. BS109420	i, 15, 18, 19, 21, 31, 35
Offutt v. United States, 348 U.S. 11, 14 (1954)	30, 33
Sturgeon v. County of Los Angeles, 167 Cal.App.4th 630 (2008)	9, 21, 31, 32
Taylor v. Hayes, 418 U.S. 489 (1974)	34
Tumey v. Ohio, 273 U.S. 510 (1927)	5, 6, 28, 29
Ward v. Monroeville, 409 U.S. 57 (1972)	6, 28, 29
White v. Davis, Calif. S.Ct. case no. S108099 (2003)	7
Withrow v. Larkin, 421 U.S. 35 (1975)	3

Statutes

18 U.S.C. § 1346	20
28 U.S.C. § 455(a)	1
28 U.S.C. § 2254	1, 2
Calif Code of Civil Procedure § 170.1	2, 17
CCP § 170.1(a)(6)(A)(iii)	16, 18, 21
CCP § 170.3	7, 16
CCP § 170.3(c)(4)	18
CCP § 1008	22
CCP § 1211	21
CCP § 1211(a)(11)	25
California Gov't. Code §§ 68220 – 68222	2

Other Authorities

California Code of Judicial Ethics – Canons 2, 3E and 4D(1)	2, 21
California Senate Bill SBX2-11	i, 2

Constitutional Provisions

CA. Constitution, Art. VI, Sec.19	2, 8, 9, 11, 20
U.S. Constitution - 1st Amendment	2, 8, 17
U.S. Constitution - 5th Amendment	2
U.S. Constitution - 14th Amendment	2, 17

Opinions Below

- Report and Recommendation of Magistrate Judge (denying writ of habeas corpus), dated June 12, 2009; (USDC Dkt 26)
- Order Accepting Report and Recommendation of Magistrate Judge dated June 29, 2009; (USDC Dkt 30)
- Memorandum of Decision – "not appropriate for publication and is not precedent except is provided by 9th Cir. R. 36-3" -- dated December 16, 2009, by Circuit Judges Reinhardt, Trott and Wardlaw; (9th Cir. Dkt 59)
- Order (Denying Petition for Rehearing and Rehearing En Banc), dated February 10, 2010, by Circuit Judges Reinhardt, Trott and Wardlaw; (9th Cir. Dkt 66)
- Order Denying Petitioner's 28 U.S.C. § 455(a) Motion to Disqualify Judges Reinhardt, Trott and Wardlaw and Void All Orders, filed February 3, 2010, dated February 12, 2010 by Circuit Judges Reinhardt, Trott and Wardlaw. (9th Cir. Dkt 68)

Statement of Subject Matter Jurisdiction

Subject matter jurisdiction in the District Court is based upon 28 U.S.C. § 2254. The appeal is from the final judgment

("Memorandum") of the Ninth Circuit issued on December 16, 2009 (9th Cir. Dkt 59), followed by the Ninth Circuit's denial on February 10, 2010 of Petitioner's request for an en banc hearing (9th Cir. Dkt 66).

Statutory Provisions Involved

- California Constitution, Art. VI, Sec.19
- California Code of Civil Procedure § 170.1
- California Code of Judicial Ethics – Canons 2, 3E and 4D(1)
- California Senate Bill SBX2-11, partially codified as California Gov't. Code Sections 68220 – 68222
- United States Constitution - First, Fifth and Fourteenth Amendments
- 28 U.S.C. § 2254

Statement of Issues

1. Whether the trial court judge in the underlying case should have recused himself for taking payments from a party in a case over which he was then presiding;

2. Whether the trial court judge in the underlying court case and in the ancillary contempt proceeding should have recused himself from the contempt proceeding because he was "embroiled" with Petitioner;

3. Whether the trial court judge in the underlying state court case and in the ancillary contempt proceeding should have recused

himself from the contempt proceeding because he was "judging his own actions".

Standard of Review

The objective standard of review was recently reiterated in *Caperton v. A.T. Massey Coal Company, Inc.*, 566 U.S. ___ (2009), in which the Court stated (Slip Opinion at page 1):

> Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 43 (1975). Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal."

In essence, the Court reviews the facts against the background of the standards and determines if the standards mandate recusal.

Summary of the Case

A. Introduction.

Petitioner (hereinafter "Fine") has been incarcerated in the Los Angeles County Jail under "coercive confinement" since March 4, 2009. He has not committed a crime. He is being held while he is challenging the trial court judge's having presided over a contempt case while "judging his own actions" and having

presided over the underlying case while having taken payments from a party to the case.

The trial judge knew that the "coercive confinement," which was secondary to the issue of "whether the trial judge should have recused himself," could not even occur unless the trial judge prevailed on the recusal issue on constitutional due process grounds. Yet, as retaliation against Fine for challenging the payments and self-judging actions, and to instill fear into all other lawyers to forestall them from making such challenges, the trial judge unlawfully incarcerated Fine during this writ process.

The initial effects of such incarceration were that Fine was ordered to be deprived of papers and pencils and access to the jail law library, thereby hampering Fine's ability to file the Federal petition for writ of habeas corpus for many weeks and ultimately requiring it to be dictated by Fine from memory over the phone to a friend, who then prepared and filed it on Fine's behalf.

The District Court and the Ninth Circuit did not hold the trial judge's actions to deny due process. This Petition seeks to enlist the Court to require the Ninth Circuit to follow and obey long established Supreme Court precedents requiring the recusal of judges when they receive payments from a party in a case over which the judge is presiding, and when the judge "judges his own actions."

The precedents mandating such recusal were recently set forth in the case of *Caperton v. A.T. Massey Coal Company Inc.*, 566 U.S. ___ (2009). In *Caperton*, the Court held that due process mandated the recusal of a West Virginia Court of Appeals Justice who denied a recusal motion, and whose election campaign committee had received $3 million in contributions from the Board Chairman and Principal Officer of a party with a potential case which subsequently was heard by the West Virginia Supreme Court of Appeals and the Justice.

The Court stated the controlling principle for due process violations, at Slip Opinion page 7, citing to *Tumey v. Ohio*, 273 U.S. 510, 532 (1927):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accuser, denies the later due process of law. "

The Court held, at Slip Opinion page 16, in relevant part:

> "... Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when without the consent of the other parties a man chooses the judge in his own case ...

> Due process 'may sometime bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties'. *Murchison*, 349 U.S. at 136. The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship's significant and disproportionate influence coupled with the temporal relationship between the election and the pending case " ' " offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true. " ' " *Lavoie*, 475 U.S., at 825 (quoting *Monroeville* 409 U.S., at 60, in turn quoting *Tumey*, 273 U.S.. at 532)."

This writ process and "coercive confinement" is the latest encounter in the ten-year campaign by Fine to restore due process to the California judicial system. Fine is the only attorney, of the approximately 208,000 California attorneys, with the courage to challenge the California judiciary for their due process violations.

Fine, who has a Doctor of Law from the University of Chicago Law School, a Ph.D. in International Law from the London School of Economics and Political Science of the University of London, and from 1995 has been

the Consul General for the Kingdom of Norway in Los Angeles, has a long established reputation for returning to, and saving the taxpayers of California approximately $1 billion which the government has illegally taken from trust and special funds. These recoveries have been accomplished through taxpayer lawsuits with Fine acting as a "Private Attorney General" on behalf of the public. In this same capacity, Fine prevailed in the California Supreme Court in the case of *White v. Davis*, which stopped the state from making payments without an appropriation; i.e., a budget. The payments to judges are another form of misappropriation of funds; i.e., bribes. Fine has already brought Federal civil rights lawsuits challenging the L.A. County payments to L.A. Superior Court Judges on both California and U.S. constitutional grounds and has challenged such payments through CCP § 170.3 objections and appropriate writs of mandate.

The L.A. Superior Court judges and others acting in concert with them retaliated against Fine. They convicted Fine of contempt on two previous occasions, both of which were subsequently voided. They refused to de-publish and void *Fine v. Superior Court*, 97 Cal.App.4th 651 (2002), after the underlying contempt order was voided and annulled by the Superior Court in response to a U.S. District Court Order to Show Cause. They filed two complaints with the State Bar, which became cases. The first was dismissed by the State Bar on the eve of trial "in the furtherance of justice."

The second violated the First Amendment in that it was based solely on documents filed in courts. The Petition for Certiorari raising the First Amendment issue was denied in U.S. Supreme Court case no. 08-1573, leaving no realistic First Amendment protection for any lawyer's paper filed in a court. Fine has filed a Federal civil rights lawsuits based upon fraud upon the court to void the disbarment and vindicate the First Amendment rights. (*Fine v. State Bar of California et al*; USDC Central District, USDC case no. CV-10-0048 JFW(CW).) They unlawfully removed Fine as "class counsel" in four cases, and decertified the class, overturned a settlement in one case and refused to approve a class in two cases where Fine was either class counsel or designated to be class counsel, amongst other acts.

Since the late 1980s, Los Angeles County and 55 of the 58 California counties have engaged in the crimes of misappropriation of funds, obstruction of justice and bribery by using County tax funds to pay County "fringe benefits" to State Superior Court judges presiding in their counties. The State Superior Court judges were State-elected constitutional officers. They were not County employees. Under Article VI, Section 19, of the California Constitution, only the State "Legislature shall prescribe the compensation for judges of courts of record." This duty was not delegable to any other body.

The County payments to the State judges were held to be unconstitutional as a violation

of Article VI, Section 19, in the case of *Sturgeon v. County of Los Angeles*, 167 Cal.App.4th 630 (2008) rev. denied 12/23/08. In response to the *Sturgeon* decision, the Administrative Office of the Court, which is part of the Judicial Council of California, drafted Senate Bill SBX2-11. Senate Bill SBX2-11 gave retroactive immunity to the judges and county officials from criminal prosecution, civil liability, and disciplinary action due to the County payments. Senate Bill SBX2-11 was enacted on 2/20/09 and became effective on May 21, 2009.

Senate Bill SBX2-11 stated with respect to immunity:

> "[N]otwithstanding any other law, no governmental entity, or officer or employee of a governmental entity, shall incur any liability or be subject to any prosecution or disciplinary action because of benefits provided to a judge under the official action of a governmental entity prior to the effective date of this act on the ground that those benefits were not authorized under law". (2009 Cal. Legis. Serv., 2nd Ex. Sess., Chap. 9 (S.B.11).)

The effect of SBX2-11 was to make it impossible to prosecute judges who had committed criminal acts such as misappropriation of funds, obstruction of justice or bribery, hold them civilly liable or remove them from office, except by voting them out at

the next election. Such election could be as long as six years away for Superior Court judges or twelve years away for appellate and California Supreme Court Justices who had received such criminal payments while Superior Court judges themselves. The immunity encompassed approximately 2,100 Superior Court judges and commissioners, numerous Court of Appeal judges, and five of the seven Supreme Court Justices, including the Chief Justice, who was Chief Judge of the L.A. Superior Court in 1987, approximately the same time that the payments to judges commenced in L.A. County.

The long-term effect of Senate Bill SBX2-11 was to maintain a criminal judicial system, which denied due process to citizens by its very existence into the indeterminate future.

The L.A. County payments to the State L.A. Superior Court judges are approximately $30 million per year, or $46,466.00 for each of the 430 State Court judges. (The payment size was reportedly increased to $57,000 per year in early July 2009.) Since the late 1980s the payments have been approximately $300 million. Effectively, L.A. County has "bought" the State judges of the L.A. Superior Court. No other party has the "choice of a judge."

Daniel Gottlieb, a Professor Emeritus of Mathematics (Ret.) of Purdue University, calculated that ten million felonies have occurred over the past 20+ years through the various California County Supervisors' payments to State Superior Court judges.

The result is that California has a "criminal judicial system," meaning a judicial system comprised of "criminals" existing on retroactive immunity and devoid of due process.

Paradoxically, the very day after release of the Ninth Circuit's Memorandum of Decision, California's Judicial Council, chaired by Chief Justice Ronald George, co-author of SBX2-11, submitted a report by its "Commission For Impartial Courts" in response to the *Caperton* decision in which it recommended the disqualification of judges from any future case in which they have received at least $1,500 in campaign contributions from either side in a case because $1,500 is "the amount that creates a 'financial interest'"

B. L.A. County and the L.A. Superior Court Judges Knew that the L.A. County Payments were Illegal from the Beginning.

In the late 1980s, L.A. County began making "fringe benefit" payments to L.A. Superior Court judges who were State-elected officials and State employees. In a November 10, 1988 letter from Sr. Asst. L.A. County Counsel Roger M. Whitby to Frank S. Zolin, County Clerk/Executive Officer, Superior Court, the L.A. County Counsel admitted that the word "compensation" in Article VI, Section 19, of the California Constitution included the fringe benefits that L.A. County was providing to the judges. The letter also admitted that the

State Legislature's function to "prescribe" such "compensation" in the State Constitution was not delegable, citing to *County of Madera v. Superior Court*, 39 Cal.App.3d 665 (1974).

Although arguing that the County should be able to make the payments, the letter did not specify any statute specifically allowing the payments and admitted such by stating at page 6: "Superior Court judges are technically state constitutional officers ...".

The letter's ultimate justification for the payments was unrelated to any legal reasoning or justification: it was a voluntary payment to judges, before whom L.A. County was appearing, for no reason other than to give them money as a pretext to obtain favorable decisions.

The letter stated at page 10:

> "The salary of a Superior Court judge is the same state wide. Thus, a judge in a small rural county may be well compensated based upon the cost of living there and in comparison to what he could earn in private practice. On the other hand, judges in Los Angeles County are moderately compensated based upon the cost of living here and in comparison to what they could earn in private practice. The Board of Supervisors has evidently found that in order to attract and retain qualified judges to serve in this county, it is necessary and appropriate to provide them with benefits such as the flexible benefit

> plan contribution and the 401(k) match, which are available to many employees in the private sector, as well as to county employees and court officers other than judges."

The "pretextual" rationale was obvious. Since judges are elected State constitutional officers, L.A. County payments to them would neither "retain" them in office, nor "attract" them or others to run for office.

The payments were essentially "bribes." The payments could be taken in cash. As of 2007 and 2008, the annual payments were $46,466.00 per judge, or 27% of the judge's $178,800.00 annual State salary. Adding the value of the State's fringe benefits, the L.A. Superior Court judges' annual compensation is approximately $255,000.00.

For the 2009-2010 fiscal year, the L.A. County benefits rose to $57,000.00 per year. The L.A. Superior Court judges' compensation will be approximately $266,000.00 per year. The Chief Justice of the U.S. Supreme Court has a salary of approximately $218,000.00 per year.

Since the late 1980s, L.A. County has paid approximately $300 million to the L.A. Superior Court judges. During FY 2007-2008, L.A. County was paying the judges $30 million.

In return, L.A. County has received untold victories from the judges of the L.A. Superior Court. L.A. County Counsel Annual Litigation

Cost Management Reports for fiscal years 2005-2006 and 2006-2007 show that not one person has won a case against L.A. County when a L.A. Superior Court judge made the decision. For fiscal year 2007-2008, it was unclear if two winning cases were jury verdicts or judge decisions. In fiscal year 2008-2009, one case was won against L.A. County by a judge's decision.

The litigation reports show that approximately 700-750 cases are brought each year. These reports do not account for children put into foster care where the County was receiving money for each child put into foster care under various programs, and other funding programs where the judge's decision would benefit the County; or eminent domain cases where the Court could lower the land value. The result is that at all times since 1988, the L.A. County payments were both a sham and a bribe, and the L.A. Superior Court judges responded by deciding cases in favor of L.A. County, having a direct effect on the value and contents of the County's coffers.

During the entire time, L.A. County did not highlight the payments to the L.A. Superior Court judges. Instead, the payments were hidden as a portion of employee expenses as part of "trial court funding" in the annual budgets. At the same time, the L.A. superior Court judges did not report the payments on their mandatory Form 700 Statements of Financial Interest and did not disclose such to any party opposing L.A. County in a case in

which the judge receiving the payments was presiding. L.A. County effectively "bought" the L.A. Superior Court for the annual payment of $30 million per year. "No other parties litigant had a choice of a judge."

C. The Actions of the State Court Judge, David P. Yaffe.

On June 14, 2007, Fine filed a petition on behalf of "Marina Strand Colony II Homeowners Association" to stop an Environmental Impact Report ("EIR") approved by the L.A. County Board of Supervisors for the redevelopment of the Del Rey Shores apartment complex in Marina Del Rey, California. (*Marina Strand Colony II Homeowners Association v. County of Los Angeles*, LASC case no. BS109420 (hereinafter referred to as the "*Marina Strand*" case).)

On October 17, 2007, Fine left the case when the State Bar Court ordered him "inactive." In November 2007, the California Supreme Court did not affirm the inactive order and did not order Fine "inactive". Fine, however, did not return to the case.

On January 8, 2008, three months after Fine left the case, trial judge David P. Yaffe ruled on cross motions to dismiss the petition for filing a request for the trial date late, to grant a writ for failure to timely provide record, and to reinstate petition if dismissed. He granted the motions to dismiss and to reinstate petition, and denied the motion to grant the

writ. He then ordered Fine to pay attorney's fees and costs to L.A. County (from which entity Judge Yaffe was simultaneously receiving, but not disclosing, payments that were both illegal at the time and also inappropriate due to their coming to him from a party to the case) and its co-applicant for the EIR without any notice to Fine, without Fine being present at the hearing and in violation of the due process clause of the U.S. Constitution and the California Public Resources Code.

Most important however, unbeknownst to Fine or his former client Marina Strand Colony II Homeowners Association, Judge Yaffe was, and had been receiving illegal payments from L.A. County in the amount of $46,466.00 per year, or 27% of his annual State salary of $178,800.00. Judge Yaffe had not disclosed such illegal payments on his mandatory Form 700 Statement of Financial Interests, nor did he disclose such to Fine or his former clients until March 20, 2008, two months after the Order was issued and ten months after the case was filed. Even then, he only disclosed his receipt of the payments after being questioned by Fine in open court.

Fine then filed a CCP § 170.3 Objection to Judge Yaffe based upon the illegal payments mandating Judge Yaffe's disqualification based upon California's Code of Civil Procedure § 170.1(a)(6)(A)(iii), which states in relevant part:

> "A judge shall be disqualified if any one or more of the following are true:

> "... A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

Judge Yaffe was also subject to the Canons of the California Code of Judicial Ethics, which apply to all judges. These include Canon 2, 3E and 4D(1).

Canon 2 states:

> "A judge should avoid impropriety and the appearance of impropriety in all of the judge's activities."

Canon 3E states:

(1) a judge shall disqualify himself or herself in any proceeding in which disqualification is required by law;

(2) in all trial court proceedings, a judge shall disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure Section 170.1, even if the judge believes there is no actual basis for disqualification.

Canon 4D(1) states:

(1) a judge shall not engage in financial dealings that:

> (a) may reasonably be perceived to exploit the judge's judicial position, or
>
> (b) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to appear before the court on which the judge serves.

Under Canon 4D(1), neither Judge Yaffe nor any L.A. Superior Court judge could accept any recurring payment from L.A. County. Under Canon 2, they could not accept any payment from L.A. County. Under Canon 3E, if they had accepted a payment from L.A. County, they had to disclose such on the record and disqualify themselves from the case. Judge Yaffe did not do this in the *Marina Strand* case. Instead, he violated the canons and CCP § 170.1(a)(6)(A)(iii). Then, upon being forced to disclose the L.A. County payments ten months after the filing of the *Marina Strand* case, Judge Yaffe did not oppose the "objection," but still refused to leave the case.

Judge Yaffe, then, on April 15, 2008, after he was automatically "disqualified" under CCP § 170.3(c)(4), entered an order requiring Fine to pay a specific sum of attorney's fees and costs, knowing that he did not have jurisdiction to do such.

On November 3, 2008, Judge Yaffe entered an Order to Show Cause Re Contempt against

Fine. On December 22, 2008, Judge Yaffe commenced the contempt trial over which he presided and "judged his own actions."

Judge Yaffe was the first witness at the contempt trial. He testified that that he received payments from L.A. County; that he did not report them on his Form 700 Statement of Financial Interests; that he did not have an employment contract with, or an arrangement to provide services with, L.A. County; that he did not deposit the L.A. County payments in his campaign account; and that he could not remember any case in the last three years that he decided against L.A. County, other than redoing the "dirt" section of the EIR in the *Marina Strand* case.

During the contempt trial, it was shown through documents that the L.A. County Board of Supervisors' vote approving the EIR was illegal and that Judge Yaffe had not granted the writ stopping the approval of the EIR on this ground. It was also shown that the proposed development did not fulfill the criterion of the EIR that it be a positive financial benefit to the County and that Judge Yaffe had not granted the writ stopping the EIR on this ground.

With respect to the illegal vote, it was shown that principals of the Epstein Family Trust, who were the legal managing partners of L.A. County's co-applicant for the EIR (Del Rey Shores Joint Venture and Del Rey Shores Joint Venture North) had made political contributions to L.A. County Supervisors Mike

Antonovich and Don Knabe above $500 within twelve months of the vote on the EIR. This invalidated the vote of these Supervisors, leaving only two affirmative votes for the EIR. However, three were needed to pass the EIR.

With respect to the failure to show a positive financial benefit to L.A. County, it was shown that no such analysis was done, and counsel for Del Rey Shores was unable to specifically demonstrate the substance of any such study. The proposed lease between L.A. County and Del Rey Shores showed an $11-million rent credit for low-cost housing when such housing was mandated by statute and no credit was needed.

Judge Yaffe's actions of not voiding the EIR while receiving payments from L.A. County demonstrated that the L.A. County payments were clearly given and being taken as a "bribe." The L.A. County payments, along with all other County payments to judges, had been legislated to be criminal under Senate Bill SBX2-11, under which Judge Yaffe and all other judges receiving County payments received retroactive immunity from criminal prosecution effective May 21, 2009.

Judge Yaffe also knew that the L.A. County payments violated Article VI, Section 19, of the California Constitution as held in the *Sturgeon* case. He further knew that he was violating the intangible right to honest services (18 U.S.C. § 1346) by taking payments and not disclosing such.

Fine had informed Judge Yaffe of these violations.

Judge Yaffe had retaliated against the charge of violating the intangible right to honest services by charging Fine with attacking the integrity of the Court (Judge Yaffe) in the November 3, 2008 Order to Show Cause Re Contempt. Such charge was unlawful as CCP § 1211 prohibits a contempt charge for attacking the integrity of the Court.

Judge Yaffe's sole response to Fine's argument that he could not preside over the *Marina Strand* case was a statement in the March 4, 2009 Judgment and Order of Contempt (at page 13, lines 18-23) in which he attempted to place the burden on Fine to disqualify him and omitted to acknowledge his duty under the Canons of Judicial Ethics to have disclosed the L.A. County payments at the outset of the case and disqualify himself under Canon 3E and CCP § 170.1(a)(6)(A)(iii).

Judge Yaffe did not respond to the charge that he was "judging his own actions."

On March 4, 2009, Judge Yaffe held Fine in contempt for not responding to questions about his assets in a judgment debtor examination to enforce award of attorney's fees and costs. Fine was "sentenced to confinement in the County Jail until he provides all information he has been ordered to provide ...".

Fine was also held in contempt for "advertising or holding himself out as practicing

or entitled to practice law, and for practicing law in this court without being an active member of the State Bar." However, at Reporter's Transcript dated March 4, 2009, page 9, line 15, to page 10, line 2, Judge Yaffe stated that there was not any court order which was violated on this charge. Fine was also found "not guilty" of "lying about his status with the Bar in pleadings filed in the court and oral arguments made before the court."

Further, Fine was found "not guilty" of "attacking the integrity of the court, the Los Angeles Superior Court in general and the State Bar Court" and "not guilty" of "making repeated motions for reconsideration in violation of CCP Section 1008."

At the March 4, 2009 hearing, Fine informed Judge Yaffe that he was seeking a writ of habeas corpus, stating at Reporter's Transcript dated March 4, 2009, pg 8, lines 5-6:

> "... as the court knows, all your actions were illegal. They aren't going to stand up...".

Fine continued, at page 8, line18, to page 10, line 17, in relevant part:

> Court: "Do you have any intention of answering these questions that you were ordered to answer by Commissioner Gross?"
>
> Mr. Fine: "Your Honor, I will not answer those questions until such time as we

have finished the writs of habeas corpus because those are my rights and I firmly believe that this entire proceeding was illegal, that you violated the United States Constitution, as well as the laws of the State of California. Your actions were illegal from the beginning because you took money from the County of Los Angeles. You then decided things in favor of the County of Los Angeles and you have been given immunity for having done those acts under Senate Bill SBX2-11 .... At such time as to my rights of appeal through a petition for writ of habeas corpus are exhausted and I lose, then I would answer the questions. Until such time, as those rights are not exhausted, I'm not answering questions. So we're in an interim procedure here, Your Honor, and if you want to throw me in jail during [the] interim procedure, you may be doing another illegal act. You know, that is your position. You have already done illegal acts. If you want to continue down that road, that is a position that obviously you have taken before and may wish to continue taking, but higher courts may come down on you."

Fine concluded, at page 24, lines 11-19:

"Now you may take your position, which you obviously have, against the Federal law. You may take your position with

> respect to claims that you have jurisdiction to do something. I have my position, which is taking you up through the courts and going into the writs of habeas corpus, which will ultimately decide these particular issues. You have done your thing here and I am respectfully advising you that it's void and it's an illegal judgment."

Fine was taken directly to the L.A. County Jail from the courthouse, where he has been incarcerated since March 4, 2009, literally one year.

Reasons For Granting Writ

Arguments

The L.A. County payments of $300 million since the late 1980s, and $30 million per year to the 430 State judges of the L.A. Superior Court, or $46,466.00 per year to each judge, which is 27% of their annual State salary of $178,800.00, has "bought" the L.A. Superior Court. No other party has a choice of a judge.

The fact that these payments were unconstitutional under Article VI, Section 19, of the California Constitution and criminal, warranting immunity from criminal prosecution, civil liability, and disciplinary action under Senate Bill SBX2-11, makes the payments more egregious.

The fact that these payments exist in 55 counties, and have accounted for approximately ten million felonies on behalf of the judges and County Supervisors, demonstrates that California does not have a functioning, fair, judicial system.

The fact that each judge who is receiving a County payment is under an obligation to disclose such and recuse himself shows that each judge is "judging his own actions." Further, the prohibition upon each judge from accepting the recurring County payments and the judges' continued acceptance of such also shows that the judge is "judging his own actions."

Judge Yaffe's presiding over the contempt proceeding was clearly an act of "judging his own actions." The act of retaliation by the L.A. Superior Court against Fine, combined with the specific acts of Judge Yaffe of making the unlawful charge of attacking the integrity of the Court while knowing that, under CCP § 1211(a)(11) a contempt action does not exist for such act, demonstrates the embroilment of Judge Yaffe.

All of these facts demonstrate that due process has been violated, that the District Court and Ninth Circuit were wrong in their decisions and that the Court must grant the Writ to require the Ninth Circuit to follow and obey long-standing Supreme Court precedent.

1. Recusal was Mandated Because the L.A. County Payments Violated Due Process.

The L.A. County payments were a $30-million-per-year misappropriation of taxpayer funds to make unconstitutional and criminal payments to State-elected judges who were not County employees. As such, they amounted to theft of taxpayer funds of approximately $300 million since 1988.

The State-elected judges receiving the payments were L.A. Superior Court judges presiding in courts where L.A. County had cases. The payments were purportedly made to "attract and retain judges to serve in L.A. County." This was a "pretext" as the judges were elected and paid by the State. Further, the judges knew that Canon 4D(1) of the Code of Judicial Ethics prohibited them from accepting a recurring payment from a person who could appear before them.

Since the payments were intended for all of the judges, and since the payments were extraordinary and amounting to 27% of the judges' annual salary, the payments precluded an opponent of L.A. County from choosing his own judge as L.A. County was able to do. The $30 million per year is probably more than the total election costs for all 430 Superior Court judges. However, if spread over six years, the payments totaled $180 million, which is over $250,000 for each judge's campaign, if the money were used for that purpose. That is a

massive contribution for a local judicial office. (As discussed hereinabove, judges are soon to be limited to $1,500 contributions before automatic recusal is triggered.)

Effectively, L.A. County bought the Court if such a contribution were even allowed. Since L.A. County regularly appeared before the L.A. Superior Court judges, it had a vested stake in making the payments. .

Viewing a similar situation of a $3-million contribution (which is 10% of one year of the L.A. County payments), this Court held in *Caperton* that Judge Benjamin must recuse himself, stating at *Caperton*, supra, Slip Opinion page 16, in relevant part:

> "Although there is no allegation of a quid pro quo agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to judge his own cause, similar fears of bias can arise when-without the consent of the other parties-a man chooses a judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.

Following the reasoning in *Caperton*, L.A. County's concept of "attracting and retaining

qualified judges to serve in L.A. County" violates due process because "L.A. County is choosing the judges of its causes without the consent of the other parties litigant". L.A. County is paying the judges both prior to the time it has a case before a judge (a bribe) and before it has a case before the judge.

The amount of money paid does not matter. The *Caperton* Court used the standard of *Tumey*, supra, where excessive money was not necessary to violate due process, only the existence of a temporal relationship between the actions of a judge and the party or the case. In *Tumey*, the payment of a small penalty was found to violate due process. In *Ward v. Monroeville*, 409 U.S. 57 (1972), the judge did not receive any money for being a judge, but inasmuch as he was also mayor of the town, he had an interest in the fines being paid to the town "Fisc." This was found to be a violation of due process. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 815 (1986), an Alabama Supreme Court Justice's casting of a deciding vote in a case which could affect a similar case where he was a plaintiff was found to be a violation of due process.

Using the objective non-financial standard, the Court in *Caperton* held at Slip Opinion page 16 that:

> "... [W]e find that Blankenship's significant and disproportionate influence – coupled with the temporal relationship between the election and the pending

> case – " ' " offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true. " ' " *Lavoie*, 475 U.S. at 825 (quoting *Monroeville*, 409 U.S. at 60, in turn quoting *Tumey*, 273 U.S. at 532). ..."

Under this holding, the L.A. County payments to Judge Yaffe and the L.A. Superior Court judges at a time during or near the time that L.A. County had a case before the judge would raise the probability of actual bias to an unconstitutional level.

The Ninth Circuit did not even consider these parts of *Caperton* in its not-for-publication, not-to-be-cited-as-precedent Memorandum of Decision. Its sole reference was to the old common law of *Tumey*, stating at page 2:

> "Fine asserts that Judge Yaffe was intolerably biased because he received employment benefits from Los Angeles County, a party to the litigation. However, unlike the circumstances of *Caperton*, Judge Yaffe's receipt of these benefits did not give him a 'direct personal, substantial, pecuniary interest' in the matter. *Id* at 2254 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927))."

It appears that the Ninth Circuit panel did not fully read the *Caperton* decision. Had they done so, they would have realized that the case did not rely on their quote from *Tumey*. They

also would have realized that Judge Yaffe received his L.A. County money personally from L.A. County while he was presiding over the *Marina Strand* case and while he was presiding over other L.A. County cases. Under the criteria used in *Caperton*, Judge Yaffe was a stronger case for recusal than Judge Benjamin, who did not receive money personally and who would only sit on the case if he were elected.

Most importantly, however, was that the Ninth Circuit was not using the correct Supreme Court precedent. Had it used the objective test used in *Caperton*, it would have been bound to find a denial of due process.

The Ninth Circuit made the same error of not following Supreme Court precedent regarding the criminal aspect of the L.A. County payments. As the L.A. County payments were "criminal" involving "bribes", there was a denial of due process. In the case of *Offutt v. United States*, 348 U.S. 11, 14 (1954), the Court stated:

> "A judge receiving a bribe from an interested party over which he is presiding does not give the appearance of justice."

The Ninth Circuit did not even address the denial of due process by the criminal L.A. County payments. Instead, it attempted to avoid precedent by making a specious and irrelevant argument at page 2 of the Memorandum of Decision as follows:

> "Fine's argument that he 'exposed' Judge Yaffe for receiving 'criminal payments' is belied by a California statute expressly providing that judges 'shall continue to receive supplemental benefits from the county or court then paying the benefits.' See Cal. Gov't. Code Section 68220; See also *Sturgeon v. County of Los Angeles*, 84 Cal.Rptr.3d 242 (2008) (rejecting taxpayers' contention that judicial compensation was unconstitutional waste or gift of public funds, but finding that judicial compensation required statutory prescription)."

Firstly, the Ninth Circuit did not disclose that Gov't. Code Section 68220 was part of Senate Bill SBX2-11; that the "continued payments" did not commence until May 21, 2009, which is after all of Judge Yaffe's actions were completed; or that the continued payments are based on those payments "as of July 1, 2008" and still be paid "on the same terms and conditions as were in effect on that date."

With respect to L.A. County, the payments were "voluntary" and part of the annual budget. The payments in effect as of July 1, 2008 would expire by their own terms on June 30, 2009, or 39 days after the statute became effective. The statute also had a 180-day termination notice that would not apply to L.A. County as the benefits ended before then.

The Ninth Circuit did not disclose that another part of Senate Bill SBX2-11, which became Govt. Code Section 68222, stated that neither the Judicial Council nor the State was obligated to pay for the County's "judicial benefits" if they stopped.

This indicated that the Legislature was not "prescribing" the continuing benefits and they would therefore be unconstitutional under Article VI, Section 19, of the California Constitution. In this regard, the Ninth Circuit did not disclose in its quotation that the *Sturgeon* case held the L.A. County payments to violate Article VI, Section 19, of the California Constitution.

The "continuing benefits" clause would also violate the single-subject rule of the California Constitution, as the stated subject of Senate Bill SBX2-11 was to grant immunity in response to the *Sturgeon* case. It would also violate that part of the California Constitution, which prohibits the State Legislature from authorizing a previous expenditure of a county where the work had been performed. Here the judges had already performed their work and the continuing benefits were based upon the work that had been performed.

Finally, the "continuing benefits" may be an unlawful tax as it is taking County taxpayer money to pay a State employee. It also would be an unconstitutional tax under Proposition 13, which requires a vote of the citizens at a general election to impose a tax.

In the final analysis, the Ninth Circuit did not address the issue of the criminal L.A. County payments violating due process and did not show that *Offutt*, supra, was not binding precedent.

2. Recusal was Mandated Because the Trial Judge was "Embroiled" with Petitioner.

Judge Yaffe became embroiled with Fine as part of the L.A. Superior Court's retaliation against Fine for challenging the L.A. County payments. Examples of Judge Yaffe's actions against Fine are:

(1) The illegal and unconstitutional January 8, 2008 Order to pay attorney's fees and costs;

(2) The March 27, 2008 Order referring to a non-existent March 18, 2008 Order;

(3) Refusing to leave case after disqualification on April 10, 2008;

(4) The April 15, 2008 Order awarding attorney's fees and costs; and

(5) The November 3, 2008 Order to Show Cause containing false and sham charges, including the charge of attacking the integrity of the Court, which is prohibited under CCP § 1211(a)(11).

Although these are in writing, as distinguished from oral outbursts, they present the same level of animosity and hatred. Judge Yaffe reached the level of "running animosity"

against Fine to disqualify him as the judge in the contempt proceeding. (See *Taylor v. Hayes*, 418 U.S. 489, 501 (1974) – a judge who had "become embroiled in a running controversy" with the defendant could not subsequently preside over that defendant's criminal contempt trial.)

The Ninth Circuit did not even address this issue in any meaningful fashion, stating only at page 2 of its Memorandum of Decision: "nor was Judge Yaffe so 'personally embroiled' that he could not preside impartially. *Crater v. Galaza*, 49 F.3d 1119, 1132 (9th Cir. 2007)."

The clear actions of Judge Yaffe, from his unconstitutional acts, to his refusal to leave the case after being disqualified, to his false orders, to his entering prohibited sections on the Order to Show Cause, demonstrate his "embroilment" and the denial of due process of his presiding over the contempt proceeding.

3. Recusal was Mandated Because the Trail Judge "Judged his Own Actions" in the Contempt Proceedings.

Judge Yaffe was both the judge over the contempt proceeding and also the first witness in the proceeding. As the judge, he therefore judged his own actions to which he testified as a witness. These actions were the heart of the contempt case.

Judge Yaffe testified that he received payments from L.A. County, that he did not

report them on his Form 700 Statement of Financial Interests, that he did not have an employment contract with or an arrangement to perform services for L.A. County, that he did not put the money in his campaign account, and that he could not remember any case in the last three years that he decided against L.A. County other than recalculating the "dirt" portion of the EIR in the *Marina Strand* case, which was minimal.

Judge Yaffe did not grant the writ of mandate to stop the EIR on the major issues, such as the illegal vote of the L.A. County Board of Supervisors approving the EIR, and the failure to show any positive financial benefit to L.A. County from the redeveloped project.

The Court in *In Re Murchison*, supra, 349 U.S. at 136, recited the general rule that "no man can be a judge in his own case", adding that "no man is permitted to try a case where he has an interest in the outcome", cited in *Caperton*, supra, at Slip Opinion page 10.

In its Memorandum of Decision, the Ninth Circuit makes the following false statement at page 2:

> "The district court correctly concludes that Los Angeles Superior Court Judge David Yaffe's refusal to recuse himself from Fine's contempt proceedings was not 'contrary to, or involved an unreasonable application of, clearly established Federal law' or an

'unreasonable determination of the facts.'"

The District Court did not make any such conclusion. In fact, the District Court did not even address the issue of Judge Yaffe refusing to recuse himself in Fine's contempt proceedings. The issue was directly raised as one of the grounds of the petition for writ of habeas corpus: it was Ground 1 and specifically referenced by Addendum to Paragraph 7, page 5. The Report and Recommendation never addressed this issue as it ceased its analysis of Ground 1 at Addendum to Paragraph 7, page 4. As a matter of note, the Petition for Writ of Habeas Corpus had seven grounds, but the Report and Recommendation only addressed five, ignoring Grounds 6 and 7, in addition to Judge Yaffe "judging his own actions" in the contempt proceeding.

Other than the aforementioned false statement, the Ninth Circuit did not address the issue of Judge Yaffe "judging his own actions" in the contempt proceeding.

Conclusion

Judge Yaffe is the tip of the iceberg. However, he also represents the path to solve the problem.

California is in the midst of a massive judicial crisis. After 20+ years of criminal payments being given to and accepted by judges, nearly every judge and justice in the State is compromised. $300 million of criminal

payments in Los Angeles County alone, plus the payments in the other of the 55 of the 58 counties over the 20+ years has institutionalized corruption and emasculated any remnant of due process.

Now, with the immunity of Senate Bill SBX2-11 ensuring that criminal judges and justices remain on the bench, Californians are faced with a lack of due process and a sentence of judicial tyranny into the indefinite future.

There is one solution; the granting of this Writ! This will enforce the constitutional right to due process. The District Court and the Ninth Circuit refused to follow established Supreme Court precedents and enforce due process.

Fine has fought for ten years, been unlawfully disbarred and unlawfully incarcerated for a year at age 69-70 to enforce the due process rights and restore the judicial system.

This Court passed over the opportunity last year by denying *certiorari* in Fine's disbarment case where he was disbarred for bringing a Federal civil rights lawsuit alleging that the L.A. County payments to L.A. Superior Court judges violated Article VI, Section 19, of the California Constitution and the First and Fourteenth Amendments to the U.S. Constitution. Such denial warned attorneys across the land that their First Amendment rights no longer existed.

Fine urges the Court to not let due process suffer the same fate as the First Amendment did last year. Enforce due process. This will require compromised judges such as Judge Yaffe to recuse themselves. The recusals will open the courts to new judges who do not have a history of corruption.

With this action, due process will be restored, the California judicial system will commence on its road to recovery, the corruption will recede and people will hopefully begin to again trust in the judicial process.

Respectfully submitted,

Dated: March 8, 2010

By:

Richard I. Fine,
In Pro Per

Richard I. Fine
Prisoner No. 1824367
c/o Men's Central Jail
441 Bauchet Street
Los Angeles, CA 90012
(310) 638-2825 (Messages)
Email. RichardIFine@gmail.com

Case No. 09- ____

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD I. FINE,
Petitioner,

v.

SHERIFF OF LOS ANGELES COUNTY,
Respondent.

On Petition for Writ of Habeas Corpus
to the Ninth Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

RICHARD I. FINE
In Pro Per
Prisoner ID 1824367
c/o Men's Central Jail
441 Bauchet Street
Los Angeles, CA 90012
(310) 638-2825 (messages)
Email:
RichardIFine@gmail.com

Opposing Counsels' Email:
Unknown

Index

1. Memorandum of Decision, entered by Ninth Circuit panel on December 16, 2009 A1

2. Report And Recommendation Of United States Magistrate Judge A4

3. Order Accepting Report and Recommendation of United States Magistrate Judge A34

4 Order Denying Petition for Rehearing and En Banc Hearing, entered by Ninth Circuit panel on February 10, 2010 A36

5. Objections, Including Memorandum In Support Of Objections, To Magistrate Judge's Report; Demand for Immediate Release A37

6. California Senate Bill SBX2-11, enacted February 20, 2009, effective May 21, 2009 A54

Dated this 12th day of April, 2010

Respectfully submitted,

BY: _____
RICHARD I. FINE,
In Pro Per

Case: 09-56073 12/16/2009 DktEntry:7165909

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD I. FINE,
Petitioner - Appellant,
v.

SHERIFF OF LOS ANGELES COUNTY;
et al., Respondents - Appellees.

FILED
DEC 16 2009
MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS

No. 09-56073
D.C. No. 2:09-cv-01914-JFW-CW

MEMORANDUM [1]

Appeal from the United States District Court for the Central District of California John F. Walter, District Judge, Presiding

Submitted December 10, 2009[2]
Pasadena, California

Before: REINHARDT, TROTT and WARDLAW, Circuit Judges.

---

1 This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

2 The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Richard Fine appeals from the district court's denial of his petition for habeas corpus. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

The district court correctly concluded that Los Angeles Superior Court Judge Yaffe's refusal to recuse himself from Fine's contempt proceedings was not "contrary to, or involved an unreasonable application of, clearly established federal law" or an "unreasonable determination of the facts." 28 U.S.C. § 2254(d); see also Jones v. Ryan, 583 F.3d 626, 636 (9th Cir. 2009) (de novo review). A judge's failure to recuse himself results in a constitutional violation where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009) (citation and quotation omitted). Fine asserts that Judge Yaffe was intolerably biased because he received employment benefits from Los Angeles County, a party to the underlying litigation. However, unlike the circumstances of Caperton, Judge Yaffe's receipt of these benefits did not give him a "direct personal, substantial, pecuniary interest" in the matter. Id. at 2259 (citing Tumey v. Ohio, 273 U.S. 510 (1927)). Nor was Judge Yaffe so "personally embroiled" that he could not preside impartially. Crater v. Galaza, 491 F.3d 1119, 1132 (9th Cir. 2007). Fine's argument that he "exposed" Judge Yaffe for receiving "criminal payments" is belied by a California statute expressly providing that judges "shall continue to receive supplemental benefits from the county or court then paying the

benefits." See Cal. Gov. Code § 68220; see also Sturgeon v. County of L.A., 84 Cal. Rptr. 3d 242 (2008) (rejecting taxpayer's contention that judicial compensation was an unconstitutional waste or gift of public funds, but finding that judicial compensation required statutory prescription).

AFFIRMED.

Case 2:09-cv-01914-JFW-CW Filed 06/12/2009

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

RICHARD I. FINE, Petitioner,	No. CV 09-1914-JFW(CW)
v.	REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE
SHERIFF LEROY D. BACA, et al., Respondents.	

This Report and Recommendation is submitted to the Honorable John F. Walter, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. The petition for habeas corpus relief should be denied and this action dismissed with prejudice.

I. PRESENT PROCEEDINGS

The pro se petitioner, Richard I. Fine, is in the custody of the Sheriff of Los Angeles County, at a

Los Angeles County jail facility, under a judgment and order of contempt and a remand order (imposing coercive civil contempt under Cal. Code of Civ. Proc. § 1219(a)) both issued on March 4, 2009, by Hon. David P. Yaffe, Judge of the Superior Court, in California Superior Court, Los Angeles County, Case No. BS109420.[1] Petitioner challenged the contempt proceeding and sought state court remedies in a habeas petition to the California Supreme Court (No. S170933), which was summarily denied on March 5, 2009. [Habeas Petition at Pet. Ex. E, summary denial listed on docket, No. S170933, on California Appellate Court's website.][2]

The present Petition for Writ of Habeas Corpus by a Person in State [2]Custody (28 U.S.C. § 2254) was filed in this court on March 19, 9 2009 (as docket no. 1). On April 21, 2009, Respondent Sheriff Baca filed a motion to dismiss (docket no.

---

[1] The "Remand Order" and the Judgment and Order of Contempt re Richard I Fine ("Judgment & Order") are both attached as Exhibit ("Ex.") A to the Declaration of Kevin McCormick in Support of Response of the Superior Court of California, County of Los Angeles ("McCormick Decl."), docket no. 16, filed May 1, 2009; the Judgment & Order is also attached as Ex. C to the present Petition ("Pet.")

[2] Because Petitioner's state habeas actions were filed before March 4, 2009, in an attempt to stay judgment, rather than afterwards in an attempt to reverse it, it is not clear whether Petitioner has properly exhausted state court remedies on his present claims for federal habeas corpus relief. However, because Respondents have not raised the exhaustion issue, substantial time has already elapsed, Petitioner has sought expeditious resolution, and Petitioner's claims all fail, this court should decide the case on its merits.

12), simply arguing that the Sheriff, although Petitioner's actual custodian, has acted under order of the superior court, and is not the real party in interest. An answer, addressing the merits of Petitioner's claims, was filed on May 1, 2009 (docket no. 15), on behalf of Judge Yaffe and the Superior Court, Los Angeles County, as Respondents and Real Parties in Interest. Petitioner has filed two responses to the answer (docket 17 no. 22, filed May 8, 2009, and docket no. 24, filed May 14, 2009).

A challenge to the legality of custody pursuant to a civil contempt order by a state court appears to be properly raised in federal district court in a habeas petition under 28 U.S.C. § 2254. Duncan v. Walker, 533 U.S. 167, 176-77, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001). The present petition has been sufficiently briefed and is ready for decision.[3]

II. STANDARD OF REVIEW

Review of the Petition in this case is governed by provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, a federal court may not grant habeas relief on a claim adjudicated on its merits in state

---

[3] Del Rey Shores Joint Venture and Del Rey Shores Joint Venture North, Real Parties in Interest in the underlying state civil case, have also sought to intervene in the present case and file pleadings, and Petitioner has opposed this. The magistrate judge has not relied on those proposed pleadings in this Report and Recommendation, and the pleadings on file suffice for disposition.

court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 19 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). A decision by a state court is "contrary to" clearly established Supreme Court law if it "'applies a rule that contradicts the governing law set forth in 22 [Supreme Court] cases'" or if it reaches a result different from Supreme Court precedent on "materially indistinguishable" facts. Price v. Vincent, 538 U.S. 634, 640, 123 S. Ct. 1848, 155 L. Ed. 2d 877 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. 2 Ct. 1495, 146 L. Ed. 2d 389 (2000)); see also Frantz v. Hazey, 533 F.3d 724, 734 (2008)(en banc) (state court decision which uses "the wrong legal rule or framework" constitutes error under "contrary to" prong of § 2254(d)(1)).

A decision involves an "unreasonable application" of federal law "'if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.'" Chia v. Cambra, 360 F.3d 997, 1002 (9th Cir. 2004)(quoting Andrade, 538 U.S. at 75). A

federal habeas court may not grant a petition simply because a state court's application of governing law was incorrect or erroneous; "[r]ather, in order for the writ to issue, the state court's application of clearly established federal law 'must [have been] objectively unreasonable.'" Id. (quoting Andrade, 538 U.S. at 76); see also Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004) ("objectively unreasonable" standard also applies to state court factual determinations).

In reviewing a state adjudication, a federal habeas court looks to the last reasoned state decision as the basis for the state court's final judgment. Barker v. Fleming, 423 F.3d 1085, 1091-92 (9th Cir. 2005) (citing Ylst v. Nunnemaker, 501 U.S. 797, 803-804, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002)). When, as here, no state court decision articulated a rationale for judgment, a federal habeas court must independently review the record to determine whether the state court adjudication was contrary to, or an unreasonable application of, controlling law. Allen v. Ornoski, 435 F.3d 946, 955 (9th Cir. 2006); Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir 2000). Although the federal habeas court independently reviews the record, it must "still defer to the state court's ultimate decision." Allen, 435 F.3d at 955 (quoting Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)).

In the present action, Petitioner challenges the superior court's contempt judgment. When he challenged that judgment in the court of appeal and the state supreme court, those courts summarily denied relief. This court cannot "look

through" these summary denials to find a rationale for adjudication in the superior court's contempt judgment, because that is the very judgment being challenged in the present petition, and not a later judgment offering a rationale for upholding it. Instead, this court must independently review the record to determine whether the final state court adjudication was contrary to, or an unreasonable application of, Supreme Court law.

III. THE STATE COURT CONTEMPT PROCEEDING

On June 14, 2007, Petitioner Fine, as counsel of record, initiated the underlying state civil action (Case No. BS109420) by filing a petition for writ of mandate on behalf of the Marina Strand Colony II Homeowners Association ("Marina Strand"), and naming the County of Los Angeles ("County") as respondent and Del Rey Shores Joint Venture and Del Rey Shores Joint Venture North as real parties in interest ("Real Parties"). [Judgment & Order at 2, 5.] The action was assigned to Judge Yaffe. [Id. at 5.] On September 13, 2007, the County and Real Parties moved to dismiss under California Public Resources Code section 21167.4 (requiring the petitioner in such an action to request a hearing within ninety days of filing the petition or be subject to a motion to dismiss). [Id.] On October 10, 2007, Petitioner Fine, on behalf of Marina Strand, filed a motion for relief from dismissal based on Petitioner Fine's own affidavit of attorney 2 fault. [Id.] In the affidavit, Petitioner Fine stated under oath 3 that he had miscalculated the time to file.

[Order Striking Notice of 4 Disqualification ("Order Striking Notice"), McCormick Decl. Ex. B, at 5 1.]

Meanwhile, on October 12, 2007, the State Bar Court (in an administrative action not related to Case No. BS109420) recommended that Petitioner Fine be disbarred and ordered him involuntarily enrolled as an inactive member of the State Bar.[4][Judgment & Order at 5.] After this, the hearing on the motions in Case No. BS109420 was continued to allow Marina Strand to obtain new counsel. [Id.] On January 8, 2008, Judge Yaffe granted both the motion to dismiss and Marina Strand's motion for relief. [Id.] Judge Jaffe 14 also ordered Petitioner Fine to pay fees and costs, noting that "Code 15 of Civil Procedure section 473(b) mandates that the court also order 16 the attorney at fault to pay reasonable compensatory legal fees and costs to opposing counsel or parties." [Order Striking Notice at 1.][5] The Real Parties

---

[4] The entry on the California State Bar's website for Richard Isaac Fine, #55259, states that he is ineligible to practice law as of October 17, 2007, and was disbarred as of March 13, 2009. The entry includes an Opinion by the Review Department of the State Bar Court, No 04-O-1436, dated September 19, 2008, upholding the October 17, 2007 decision, and stating that the disciplinary action was based on five cases other than Case No BS109420 (but showing a similar pattern of conduct). [See also McCormick Decl Ex C.]

[5] California Code of Civil Procedure section 473(b) provides "[T]he court shall, whenever an application for relief is made [in timely fashion], is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, ... vacate any ... dismissal entered against his or her client, unless the court finds that the .. dismissal was not in fact caused by the attorney's mistake, ... The court shall.

then filed a memorandum of costs, and Petitioner Fine filed two motions to tax. [Judgment & Order at 5.]

On February 19, 2008, Petitioner Fine filed a document in which he attempted to disqualify Judge Yaffe and all judges of the Los Angeles Superior Court.[6] [Order Striking Notice at 1-2.] In an order filed March 18, 2008, Judge Yaffe ordered the disqualification stricken (1) as giving insufficient notice, (2) because it was not filed by a party or [current] attorney for a party, (3) because a challenge may only be made against a presiding judge and not all judges, (4) because it was untimely, and (5) because it "disclosed on its face no legal grounds for disqualification." [Id. at 2.] Judge Yaffe advised Petitioner that the strike order could only by reviewed if he sought a writ of mandate from the court of appeal within ten days. [Id. at 2-3.] Instead, Petitioner filed another notice of disqualification on March 25, 2008. [Judgment & Order at 6; Order Striking Notice at 3.] Judge Yaffe issued a final order striking both 16 notices on March 27, 2008. [Order Striking Notice, passim.]

On April 10, 2008, a hearing was convened on Petitioner's motions to tax costs, but when he refused to proceed, claiming that Judge Yaffe had

---

whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties."

[6] Petitioner's theory -- that Judge Yaffe and all judges of the Los Angeles Superior Court should be disqualified because they received illegal benefits from the County -- is discussed below.

been disqualified, the motions were taken off calendar. [Judgment & Order at 6.] On April 11, 2008, Petitioner filed another notice of disqualification, but a copy was not properly served on Judge Yaffe. [Id.] On June 16, 2008, Petitioner Fine filed a memorandum claiming other costs, purportedly on behalf of Marina 24 Strand. [Id.]

Petitioner Fine was ordered to appear for a judgment debtor examination before Commissioner Murray Gross. A series of judgment debtor examinations were held (on June 18, 2008, August 25, 2008 October 15, 2008, and December 29, 2008), at which Petitioner refused to answer questions or produce documents in response to subpoenas, even though Commissioner Gross overruled Petitioner's objections. [Id. at 6-7.] 7

On November 3, 2008, the Real Parties applied for an order to show cause re contempt against Petitioner Fine. [Id. at 2.] Judge Yaffe issued an order to show cause on November 3, 2008, and set trial for December 22, 2008. [Id.] The order to show cause set forth sixteen charges at [Id. set 2-4]. which were reorganized for trial s the following five charges:

1. "Failing to answer Judgment Debtor Examinations despite valid service of a subpoena and being lawfully ordered to do so by Commissioner Gross . . ."

2. "Attacking the integrity of this court, the Los Angeles Superior Court in general and the State Bar Court . . ."

3."Making repeated Motions for reconsideration in violation of [Code of Civil Procedure] § 1008 . . ."

4. "Practicing law, and/or holding himself out as entitled to practice law in the State of California when he was not entitled to practice law in the State of California . . ."

5. "Lying about his status with the State Bar in pleadings filed in this court and in oral arguments made before this court . . ." [Id. at 4.]

Trial was held before Judge Yaffe on December 22, 24, 26, and 30, 2008 and January 8, 12, and 22 2009. [Id.] The Real Parties 28 appeared, through counsel, as accusing parties, and Petitioner Fine appeared pro se. [Id.] Petitioner was advised of his right to counsel and his right against self-incrimination; he waived the former and asserted the latter. [Id.]

Judge Yaffe's findings of fact, conclusions of law, and judicial findings are included in the Judgment & Order of March 4, 2009. [Id., passim.] Judge Yaffe found Petitioner guilty of contempt, beyond a reasonable doubt, on charges one and four, and not guilty on charges two, three, and five. [Id. at 11-12.] On charge one Judge Yaffe found that Petitioner willfully disobeyed Commissioner Gross's orders and subpoenas on multiple occasions. [Id.] On charge four Judge Yaffe found that Petitioner practiced law and held himself out as practicing law, in violation of California Business & Professions Code sections 6006, 6125, and 6127(b), when he filed a memorandum of costs (purportedly on behalf of Marina Strand), continued to issue subpoenas, and continued to

maintain a website for his legal practice.[6] [Id. at 6, 8, and 12.]

Judge Yaffe pronounced sentence on March 4, 2009. [See "Sentencing Transcript," McCormick Decl. Ex. D.] On charge one, Judge Yaffe sentenced Petitioner to be confined in the county jail until he complied with Commissioner Gross's orders, and ordered him to pay attorney's fees to the accusing parties. [Judgment & Order at 13-14.] On charge four, Judge Yaffe imposed a fine of $1,000, or five days in county jail consecutive to the custody on charge one. [Id. at 14.] Only the sentence for civil contempt under California Code of Civil Procedure section 1219(a) is referenced in the order remanding Petitioner to the custody of the Sheriff. [Remand Order, McCormick Decl. Ex. A.] There is nothing in the record to show whether or not Petitioner has paid the fine on the criminal contempt, and nothing in the record to indicate that he has been ordered jailed for failure to pay the fine.

At the sentencing hearing Petitioner indicated that he would go on refusing to answer Commissioner Gross's questions until his habeas corpus actions (including the present case) were "entirely finished," but would answer the questions if he lost in the habeas proceedings.[Sentencing Transcript at 9-11.] To

---

[6] A website for "Law Offices of Richard I. Fine & Associates" is still open at www.richardfinelaw.com, and gives no indication that Petitioner has been disbarred. The website includes, inter alia, the claim that Richard Fine is Consul General for the Kingdom of Norway.

date, Petitioner has not complied with the contempt order and remains in custody at Los Angeles County Jail for civil contempt.

IV. PETITIONER'S PRESENT GROUNDS FOR RELIEF

In the present petition, Petitioner asserts five grounds on which seeks release from the custody imposed under the contempt judgment, follows:

1. "Judge Yaffe violated Petitioner's due process rights by judging his own unlawful criticized action."

2. "Denial of right to an 'impartial adjudicator' because Judge Yaffe was 'personally embroiled' in the proceeding."

3. "Denial of right to jury trial despite criminal charges being included in [the] order to show cause re contempt."

4. "Denial of right to impartial prosecutor because attorneys appointed to prosecute contempt had financial interest in enforcing underlying judgment."

5. "Decision was based on an unreasonable determination of the facts in light of the evidence under 28 U.S.C. [§] 2254(d)(2)."

[Pet. at 5-6.] These are the only grounds for relief asserted in the petition itself, and are discussed in detail below.

V. DISCUSSION

A. GENERAL ISSUES ON CIVIL AND CRIMINAL CONTEMPT

Actions which may constitute contempt of court under California law are listed at California Code of Civil Procedure section 1209. A contempt committed in the immediate presence of a court may be addressed summarily. Cal. Civ. Pro. Code § 1211. When an alleged contempt did not occur in the presence of the court, the court may 9 issue an order to show cause, hold a trial, and issue a judgment. Id. 10 §§ 1211-1218.

There is a significant distinction between civil contempt and criminal contempt. See Witkin, California Procedure, Fourth Edition, 13 Vol. 3, Actions, § 18. "Whether contempt is civil or criminal depends 14 on the purpose and character of the sanction imposed." Kirkland v. Legion Ins. Co., 343 F.3d 1135, 1140 (9th Cir. 2003).

> "If its purpose is to punish a past violation of a court order the contempt is criminal. If its purpose is remedial, 17; i.e., to compensate for the costs of the contemptuous conduct or to coerce future compliance with the court's order, the contempt order is civil."

Id. (quoting Portland Feminist Women's Health Ctr. v. Advocates for 20 Life, Inc., 877 F.2d 787, 790 (9th Cir. 1989)). Both civil and criminal contempt remedies are properly within a judge's powers so long as they are "exercised consistently with state and federal law." See Illinois v. Allen,

397 U.S. 337, 345, 90 S. Ct. 1057, 25 L. Ed. 2d 24 353 (1970).

In Petitioner Fine's contempt proceeding, he was charged with and tried for both civil and criminal contempt, and was convicted on one count of each. [See Judgment & Order, passim.] Charge one (failure to comply with Commissioner Gross's orders, on which the superior court ordered Petitioner jailed until he complies and to pay attorney's fees) falls under civil contempt. [See Judgment & Order at 3 13-14.] On the other hand, charge four (unauthorized practice of law, on which the superior court imposed a fine of $1,000 or a further five days in jail) falls under criminal contempt. [Id. at 14.][7]

As noted above, under the terms of the remand order, Petitioner is now in custody on the civil contempt only. [Remand Order, McCormick Decl. Ex. A.] As to the criminal contempt, Petitioner appears to face the hypothetical possibility of further confinement if he fails to pay the fine imposed by the court. However, the present record does not indicate that any such custody has yet been ordered. Petitioner is not now in custody on a sentence for criminal contempt, and cannot use this federal habeas corpus proceeding to challenge

---

[7] On a finding of civil contempt, consisting of failure to perform an act a person is still capable of performing, a court may order the person jailed until the act is performed. Cal Civ. Pro. Code § 1219 On a finding of criminal contempt, a California court may, generally, impose a fine of not more than $1,000, or a jail term not exceeding five days Id § 1218(a)

either the imposition of a fine or the possibility that an additional term of jail time may be imposed if he does not pay the fine. See Dremann v. Francis, 828 F.2d 6, 7 (9th Cir. 1987)(per curiam) (imposition of fine does not satisfy "in custody" requirement of 28 U.S.C. § 2254(a) even if incarceration may later be imposed for failure to pay); United States v. Kramer, 195 F.3d 1129, 11 (9th Cir. 20 1999) (analogous issue in 28 U.S.C. § 2255 motion challenging restitution).

B. GROUND THREE -- NO TRIAL BY JURY

Under Ground Three, Petitioner contends that his bench trial for contempt violated the Sixth Amendment right to trial by jury in all criminal prosecutions. [Pet., Addendum to ¶ 7 at 5-6.]

The Sixth Amendment right to trial by jury applies to state criminal proceedings. See Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). However, the right to trial by jury only applies to prosecutions for serious crimes, not petty offenses. See Blanton v. North Las Vegas, 489 U.S. 538, 542, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989); Duncan, 391 U.S. at 159-61. For example, any crime punishable by a sentence greater than six months requires trial by jury. Blanton, 489 U.S. at 556; Duncan, 391 U.S. at 161-62. For crimes punishable by a sentence of no more that six months, the right to trial by jury only attaches if additional penalties are so severe that the legislature clearly determined that the offense was a serious crime. See United States v.

Nachtigal, 507 U.S. 1, 5-6, 113 S.Ct. 1072, 122 L.Ed.2d 374 (1993) (no jury trial when 15 maximum penalty was six months in jail and $5,000 fine or five years probation); United States v. Ballek, 170 F.3d 871, 87 (9th Cir. 1999) (no right to jury trial when court ordered six months in jail and $50,000 in restitution).

A defendant in a criminal contempt proceeding may also be entitled to a jury trial, but the same criterion of seriousness applies. See United Mine Workers v. Bagwell, 512 U.S. 821, 826-27, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)(right to jury trial when criminal contempt involves imprisonment for more than six months); but see Muniz v. Hoffman, 422 U.S. 454, 475-76, 95 S. Ct. 2178, 45 L. Ed. 2d 319 (1975) (no right to jury trial when contempt involves imprisonment for no more than six months).

Here, Petitioner specifically claims that he was entitled to trial by jury because the charges against him included a criminal charge of unauthorized practice of law under Cal. Bus. & Prof. Code 2 section 6126 (unauthorized practice of law as a misdemeanor or felony). The record does not support this claim. In the contempt proceeding, Petitioner was actually charged (and found guilty and sentenced) under Bus. & Prof. Code section 6127 (unauthorized practice of law as contempt of court) and not section 6126. [Judgment & Order at 3, 10, 12, and 14.] Furthermore, Petitioner was charged, found guilty, and sentenced for criminal contempt under Civ. Pro. Code section 1218(a), allowing a maximum penalty of a $1,000 fine and five days in jail. In Petitioner's case, however,

Judge Yaffe imposed a fine of $1,000 or five days in jail. The record does not indicate that the alternative jail time has been imposed, or that Petitioner is now in custody for failure to pay the fine.

Thus, Petitioner was not charged with a serious crime or a serious criminal contempt, and is not now in custody under a criminal contempt judgment. Accordingly, the Sixth Amendment right to jury trial does not apply in his case.[8] Therefore, the claim in Ground 18 Three is without merit, and state court adjudications rejecting it were neither contrary to nor an unreasonable application of clearly established federal law.

C. GROUNDS ONE AND TWO -- TRIAL BEFORE JUDGE YAFFE

The contempt proceeding was brought as a bench trial before Judge Yaffe, presiding judge in the underlying state civil action, pursuant to Civ. Pro. Code sections 1211-1219 and Los Angeles County Superior Court Rules 2.5(j) and 9.7. Under Grounds One and Two Petitioner claims that, because his contempt trial was held before Judge Yaffe rather than another judge, he was denied the right to an impartial adjudicator under the Fourteenth Amendment. [Pet., Addendum to ¶ 7 at 4-5.] Under Ground One, Petitioner contends that

---

[9] Petitioner does not assert that he was entitled to a jury trial on the civil contempt charges, and there is no right to a jury trial on civil contempt. See Shillitani v. United States, 384 U.S. 364, 365, 86 S Ct 1531, 16 L Ed 2d 622 (1966)

Judge Yaffe was properly challenged and should have recused himself in the underlying action. [Id. at 4.] Under Ground Two, Petitioner contends that Judge Yaffe should not have presided over the contempt proceeding because of "personal embroilment" in the action. [Id. at 5.]

1. Petitioner's General Contention

Petitioner claims that he has properly challenged the judges of the Los Angeles Superior Court in general, and Judge Yaffe in particular, for taking unconstitutional payments from Los Angeles County while hearing cases in which the County is a party. [Pet., Addendum to ¶ 7 at 4.] Petitioner's claims are premised on a practice under which Los Angeles County (and other California counties) has provided additional benefits to judges beyond their state salaries. [Pet., Addendum to ¶ 7, pp. 1-3.] Petitioner contends that judges who have received this extra compensation tend to be biased in favor of the County and that it is improper for them to preside over cases in which the County is a party. [Id.; see also Sentencing Transcript at 17-25.] Petitioner argues that his position has been vindicated by the California Court of Appeal in Sturgeon v. County of Los Angeles, 167 Cal. App. 4th 630, 84 Cal. Rptr. 3d 242, rev. denied (2008). [Pet., Addendum to ¶ 7, pp. 4-5.]

The underlying action in Sturgeon was a taxpayer suit challenging Los Angeles County's practice of providing additional benefits to superior and municipal court judges beyond their state salaries. Sturgeon, 167 Cal. App. 4th at 635. In

essence, the County has provided judges with medical and retirement benefits equal to those it provides its own employees. Id. at 635-36. The taxpayer plaintiff challenged the legality of these benefits under numerous provisions of the state constitution and statutes. Id. at 636. The trial court denied the plaintiff's claims, granting summary judgment in favor of the County, and the plaintiff appealed. Id. at 637.

The court of appeal rejected plaintiff's arguments that the additional benefits are an unconstitutional gift of public funds under Cal. Const., Art. XVI, section 6, or a waste of public funds under Cal. Civ. Pro. Code section 526a. Id. at 637-39. The court of appeal also found that such benefits were consistent with and, in fact, authorized by the Lockyer-Isenberg Trial Court Funding Act of 1997, Cal. Gov. Code section 77000 et seq., in which the state assumed responsibility for funding trial courts that sit in counties. Id. at 639-642. However, in light of Cal. Const. Art. VI, section 19, which provides that the state legislature "prescribe compensation for judges of courts of record," the court of appeal found that the legislature could not delegate to the counties its duty to prescribe compensation, as it appeared to have done. Id. at 635, 642-630.

The court of appeal recognized that there were valid reasons for the County to provide additional benefits to judges, and that the legislature had recognized this by providing a credit to counties for judicial benefits and ensuring that judicial benefits would not be decreased as a result of reorganization of the courts. Id. at 630. However,

the court of appeal also found that the constitutional duty to prescribe judicial compensation under Art. VI, section 19, means 27 that the legislature must set statewide policy on the issue. Id. The legislature may not leave it to counties to determine how to provide additional benefits to judges; instead, the legislature must "consider the specific issue and, at a minimum, establish or reference identifiable standards." Id.

Effective May 21, 2009, the California legislature took note of the Sturgeon opinion, and enacted legislation explicitly extending existing county-provided benefits for judges, establishing standards, and specifically providing as follows (in section 5):

> Notwithstanding any other law, no governmental entity, or officer or employee of a governmental entity, shall incur any liability or be subject to prosecution or disciplinary action because of benefits provided to a judge under the official action of a governmental entity prior to the effective date of this act on the ground that those benefits were not authorized under law.

2009 Cal. Legis. Serv., 2nd Ex. Sess., Chap. 9 (S.B. 11). Thus, the state legislature has reaffirmed the practice in question, set standards, and provided immunity to governmental employees who might otherwise be subjected to suit, prosecution, or disciplinary action on the grounds that the prior county benefits for judges were illegal.

Petitioner is correct that the court of appeal found that the manner in which the County previously provided additional benefits to judges

was unconstitutional; however, the same court found nothing unconstitutional in a policy under which counties provide such benefits, so long as the state legislature specifically authorized it and set standards. Although the court of appeal found the county policy, as practiced, unconstitutional on narrow grounds, neither that court nor any other legal authority has suggested that judges who received the additional benefits committed any impropriety or exhibited the reality or appearance of bias as a result. Furthermore, as Petitioner has acknowledged, the legislature has now made the judges and all other government employees involved in the prior practice legally immune. There is thus no basis in law for Petitioner's contention that all judges who have ever received these county-provided benefits must be precluded, as necessarily biased, from participating in cases in which the county in question is a party.[10]

2. Ground One: Judge Yaffe's Failure to Recuse Himself

Under Ground One, Petitioner claims specifically that he properly challenged Judge Yaffe (for taking unconstitutional payments from Los Angeles County while hearing a case in which the County was a party), and that Judge Yaffe should have recused himself as presiding judge in the underlying action. [Pet., Addendum to § 7 at 4.] However, these contentions fail in light of the history of the underlying case.

Petitioner initiated the underlying state action on June 14, 2007, by filing a petition in

superior court in Los Angeles County which named Los Angeles County as respondent. [Judgment & Order at 2, 5.] There is no indication in the record that Petitioner sought, at that time, to disqualify Judge Yaffe, or Los Angeles superior court judges in general, based on allegations that they received improper payment from the County. On September 13, 2007, the opposing parties moved to dismiss the underlying action (for failure to file a timely request for hearing), and on October 10, 2007, Petitioner filed a motion to relieve his client, Marina Strand, from dismissal based on Petitioner's affidavit (acknowledging that the delay was his fault). [Id. at 5.] There was still no attempt to disqualify Judge Yaffe.

On October 12, 2007, the State Bar Court ordered Petitioner involuntarily enrolled as an inactive member of the bar, requiring his removal as counsel for Marina Strand. [Id.] On January 8, 2008, 3 Judge Yaffe granted Marina Strand's motion for relief from dismissal, but also, as required by state law, ordered that Petitioner pay fees and costs as, by his own admission, the attorney at fault. [Order 6 Striking Notice at 1.]

It was not until February 19, 2008, that Petitioner first attempted to disqualify Judge Yaffe. [Id. at 1-2.] Judge Yaffe ordered the request for disqualification struck on several grounds, including the dispositive ground that Petitioner, who was neither a party nor current attorney of record for a party, had no standing to disqualify the presiding judge. [Id. at 2.] Petitioner (who continued to lack standing to do so) filed another request for disqualification on March 25, 2008, and

Judge Yaffe finally struck both requests on March 27, 2008. [Id. at 3.] Thus, although Petitioner portrays himself as a crusader against biased judges, the record indicates that he was content to litigate his case against the County in front of Judge Yaffe, without attempting to disqualify him, for over a year, until (1) Judge Yaffe ruled against Petitioner's personal financial interest, and (2) Petitioner no longer had standing to seek disqualification.[9] On this record, there is no merit in Petitioner's claim that he was denied his right to an impartial adjudicator in the contempt proceeding because Judge Yaffe was disqualified and should have recused himself in the underlying action. Therefore, state court adjudications rejecting this claim were neither contrary to nor an unreasonable application of clearly established federal law.

3. Ground Two: Judge Yaffe's "Personal Embroilment"

Under Ground Two, Petitioner claims that Judge Yaffe should not have presided over the contempt proceeding because he was "personally embroiled" in the dispute; in support, Petitioner relies on and quotes language from the Supreme Court's holding in Mayberry v. Pennsylvania, 400

[9] 11 The State Bar Court Opinion cited above (No. 04 O-1436, dated September 19, 2008), indicates a repeated pattern in which Petitioner only attempted to disqualify judges once they ruled against him on matters involving payments by or to him.

U.S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971). [Pet., Addendum to ¶7at5.]

In Mayberry, the Court reviewed a case in which a criminal defendant, representing himself, repeatedly displayed outrageously contemptuous behavior during a twenty-one day trial. 400 U.S. at 455- 13 462. After the defendant was convicted, and before imposing sentence on that conviction, the trial judge found him guilty of one or more acts of criminal contempt on eleven days, and sentenced him to one to two years imprisonment on eleven counts of contempt, for a total of eleven to twenty-two years. Id. at 455. On review, the Court found that, under the circumstances, criminal contempt was one appropriate remedy (among several possible remedies). Id. at 463. However, the Court observed that, when a trial judge does not immediately act to impose sanctions for contempt, and "where the marks of the contempt have left personal stings," "it is generally wise" for the judge in question to refer trial on the contempt to another judge. Id. at 464- 24 65. The Court further observed that, at times, a judge may become so "personally embroiled" with a lawyer in a trial "as to make the judge unfit to sit in judgment" on a contempt charge against that lawyer. Id. at 465. The Mayberry Court continued as follows: "The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance." Id. (quoting Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)).

The Mayberry Court noted that not every attack on a judge disqualifies him from sitting on a contempt proceeding, citing a case in which the Court held that, although a lawyer's remarks were "disruptive, recalcitrant and disagreeable commentary," they were not "an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." Id. (quoting Ungar v. Sarafite, 376 U.S. 575, 584, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)). Nevertheless, the Court found that the contemptuous utterances of the pro se defendant in Mayberry were the sort of insults that were apt to strike "at the most vulnerable and human qualities of a judge's temperament." Id. at 466 (quoting Bloom v. Illinois, 391 U.S. 194, 202, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968). For example, the defendant called the judge a "dirty sonofabitch," a "dirty tyrannical old dog," a "stumbling dog," and a "fool"; said that the judge was running a Spanish Inquisition; and told the judge to "Go to hell," and to "Keep your mouth shut." Id. Accordingly, the Mayberry Court held that, under the circumstances in that case, the defendant "should be given a public trial before a judge other than the one reviled by the contemnor." Id.

In Petitioner's case, neither Petitioner nor Judge Yaffe behaved the antagonists in Mayberry. The record shows that Judge Yaffe gave Petitioner ample warning about possible contempt sanctions for his actions, held a lengthy trial on the issue, came to a moderate and reasonable conclusion (acquitting on three charges and convicting on two) , conducted the sentencing in a calm and measured

way, imposed an appropriate sentence for civil contempt (confinement until Petitioner complies with simple legal orders he has conceded he is capable of complying with), and imposed a statutorily proper fine for criminal contempt (as opposed to the sentence of eleven to twenty-two years in prison in Mayberry). Similarly, Petitioner did not display towards Judge Yaffe the sort of personal vituperation shown by the defendant in Mayberry. Instead, Petitioner simply maintained (as he continues to maintain) his legal position (on disqualification of judges receiving county benefits but hearing cases involving a county) based on which he refused (and continues to refuse) to comply with orders he considers illegal. Petitioner maintains this argument, categorically, with respect to all judges who have ever received the county benefits in question, and has not made any specific and distinct personal attack on Judge Yaffe.

Petitioner makes the conclusory allegation that "Judge Yaffe was emotionally involved in vindicating his hurt feelings and anger against Petitioner." [Pet., Addendum to ¶ 7 at 5.] However, there is no evidence in the record that Judge Yaffe showed hurt feelings or anger toward Petitioner, or that he became so "personally embroiled" in the case that he could not preside over the contempt proceedings without bias or an appearance of bias. On the contrary, the record shows that Petitioner, although obstinate and recalcitrant, was not personally offensive or insulting and that Judge Yaffe was patient and professional in dealing with Petitioner while carrying out his judicial duties

and vindicating the proper authority of his court. Therefore, Petitioner's claim in Ground Two is also without merit, and state court adjudications rejecting it were neither contrary to nor an unreasonable application of clearly established federal law.

D. GROUND FOUR -- PROSECUTION BY OPPOSING COUNSEL

Under Ground Four, Petitioner claims that he was denied the right to an impartial prosecutor under the due process clause of the Fourteenth Amendment when the contempt claim against him was prosecuted by attorneys who had a financial interest in enforcing the underlying judgment. [Pet. at 6; Pet., Addendum to ¶ 7 at 6-7.] In support, Petitioner cites Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987). In Young, the Court held that when a federal district court decides to try a party for criminal contempt for violation of an injunction, that court may request that the United States Attorney prosecute, or may appoint private counsel to prosecute, but may not appoint counsel for a party that is the private beneficiary of the court order allegedly violated by the contemnor. Young, 481 U.S. at 800-09, 815.12

Petitioner's case is distinguishable from Young. For one thing, Young involved a federal district court, its inherent authority to initiate contempt proceedings, the application of the Federal Rules of Criminal Procedure in a criminal contempt proceeding, and the Supreme Court's

supervisory authority over the federal courts. Young, 481 U.S. at 793-809, 815.[10] Petitioner's case involves a state court, and Petitioner asserts a due process violation under the Fourteenth Amendment. However, the Young Court did not conduct a constitutional analysis, or extend its holding to the conduct of criminal contempt proceedings in state courts. Petitioner has not cited, and the magistrate judge is not aware of, any authority for the proposition that the federal constitution prohibits the prosecution of a criminal contempt proceeding in state court by opposing counsel.

Furthermore, as discussed above, Petitioner is in custody on a civil contempt judgment, not a criminal contempt judgment, and his challenge in this habeas corpus proceeding is limited to the legality of the custody for civil contempt. Even in federal court, the right to an independent prosecutor in contempt proceedings recognized in Young, applies only to criminal contempt and not civil contempt. See Portland Feminist Women's Health Center v. Advocates for Life, Inc., 877 F.2d 787, 790 (9th Cir. 1989).[11]

---

[10] 12 In contrast to the rule limiting the right to jury trial to serious contempts, the Young Court did not limit this prohibition to serious contempts. Id. at 809 n 20

[11] 13 A civil contempt proceeding is, in essence, an alternative remedy by which a successful litigant may obtain enforcement of certain kinds of judgments Witkin, California Procedure, Fourth Edition, Vol 3, Actions, § 18 It is therefore appropriate that such a proceeding be prosecuted by opposing counsel

Accordingly, Petitioner has not shown that his custody under a 12 state civil contempt judgment violates any federal constitutional right to an independent prosecutor. Therefore, his claim in Ground Four is without merit, and state court adjudications rejecting it were neither contrary to nor an unreasonable application of clearly established federal law.

E. PURPORTED GROUND FIVE

Under "Ground Five," Petitioner states as follows: "Decision was 19 based on an unreasonable determination of the facts in light of the 20 evidence under 28 U.S.C. [§] 2254(d)(2)." [Pet. at 6; Pet., Addendum 21 to ¶ 7 at 6 7.] This does not assert a separate ground for federal habeas corpus relief. At most, it amounts to the contention that state court decisions rejecting Petitioner's other claims were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).[12] However, as discussed above, the applicable law, and the factual 3 record available to the state courts on reviewing Petitioner's claims, 4 reasonably support the following conclusions: (1) Petitioner is now in 5 custody on civil contempt only, not criminal contempt; (2) Judge Yaffe 6

---

[12] 14 Like 28 U.S.C. § 2254(d)(1), § 2254(d)(2) limits the power of a federal habeas court to set aside the decision of a state appellate or habeas court; it does not define a ground for federal habeas relief based on an unreasonable factual determination at trial

struck Petitioner's requests for disqualification based on procedural 7 defects and lack of standing; (3) the record does not show that Judge 8 Yaffe was biased when he ordered Petitioner jailed for civil contempt; 9 and (4) the record does not show any impropriety in prosecution of the contempt proceeding by opposing counsel. The state courts' rejection of Petitioner's claims follows from the above conclusions, and Petitioner has not shown that any of those conclusions are based on an unreasonable factual determination. Therefore, Petitioner has not shown that this court should set aside the state courts' adjudication pursuant to 28 U.S.C. § 2254(d)(2).

VI. RECOMMENDATION

It is therefore recommended that the court issue an order: (1) approving and accepting this Report and Recommendation; and (2) denying the petition and dismissing this action with prejudice.

DATED: June 12, 2009

/s/ CARLA M. WOEHRLE
United States Magistrate Judge

Case 2:09-cv-01914-JFW-CW Doc#30 06/29/2009

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA,

RICHARD I. FINE, Petitioner,	Case No. CV 09-1914-JFW(CW)
v.	ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE
SHERIFF OF LOS ANGELES COUNTY, Respondent	

Pursuant to 28 U.S.C. § 636(b)(1)(C), the court has reviewed the entire record in this action, as well as the Report and Recommendation of the United States Magistrate Judge and all objections thereto. The court has made a de novo determination with respect to those portions of the Report and Recommendation to which objection has been made.

IT IS ORDERED: (1) that the Report and Recommendation of the United States Magistrate Judge be accepted; (2) that judgment be entered denying the petition and dismissing this action

with prejudice; and (3) that the following motions be dismissed as moot in light of this order: Petitioner's ex parte application for order for immediate release (docket no. 9, filed April 9, 2009), Respondent Sheriff Baca's motion to dismiss (docket no. 12, filed April 24,2009), the Del Rey Parties' ex parte application to intervene (docket no. 21, filed May 8, 2009), and Petitioner's request for order for immediate release, etc. (docket no. 23, filed May 14, 2009). **IT IS FURTHER ORDERED** that this order and the judgment herein be served on the parties.

DATED: June 29, 2009

JOHN F. WALTER
United States District Judge

Case: 09-56073 02/10/2010 ID: 7226626

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD I. FINE, Petitioner - Appellant,
v.
SHERIFF OF LOS ANGELES COUNTY; et al.,
Respondents - Appellees.

FILED
FEB 10 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 09-56073
D.C. No. 2:09-cv-01914-JFW-CW Central District of California, Los Angeles

ORDER

Before: REINHARDT, TROTT and WARDLAW, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing. Judge Reinhardt and Judge Wardlaw have voted to deny Appellant's petitions for rehearing en banc, and Judge Trott so recommends. The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing en banc are denied. No further motions shall be entertained in this appeal.

IT IS SO ORDERED.

Case 2:09-cv-01914-JFW-CW Doc#29 06/25/2009

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

RICHARD I. FINE, Petitioner,	Case No. CV 09-1914-JFW(CW)
v.	OBJECTIONS, INCLUDING MEMORANDUM IN SUPPORT OF OBJECTIONS, TO MAGISTRATE JUDGE'S REPORT; DEMAND FOR IMMEDIATE RELEASE
SHERIFF OF LOS ANGELES COUNTY, Respondent	

EXCERPTS

.....

I. Prefatory Statement

A. Nature of the Case

This is a simple case which arose from and centers upon Los Angeles Superior Court Judge David P. Yaffe's receipt of illegal payments of approximately $46,300 per year from LA County, in addition to his state salary of approximately

$179,000 per year. In essence, Judge Yaffe receives 28% of his total salary as an illegal payment. All other Los Angeles Superior Court judges also receive the same 28% illegal payment.

In this case, the Petition for Writ of Habeas Corpus (hereinafter the "Petition") was not opposed by the Respondent, the Sheriff of Los Angeles ("LA") County. The grounds of the Petition, the claims of the Petition and the facts asserted in the Petition were not opposed or disputed by the LA Superior Court or Judge Yaffe. For these reasons alone, the Petition must be granted. Since there is no opposition, and the LA Superior Court and Judge Yaffe have reversed their positions, there is no reason for either the Magistrate Judge or this Court to deny the Writ. At this point in time, the only person who is supporting the illegal and unconstitutional conduct of Judge Yaffe, the LA Superior Court and LA County is the Magistrate Judge. As shown herein, the California State Court has held the LA County payments to be unconstitutional. The California State Legislature has declared such to be immune from criminal prosecution, thereby making such acts criminal. A recent U.S. Supreme Court decision has re-affirmed that such acts deny due process.

Neither Judge Yaffe nor other LA Superior Court judges disclosed such LA County payments on their Form 700 financial disclosure statements, nor to parties before them in cases where LA County was the opposing party. Judge

Yaffe and other LA Superior Court judges have then decided cases or made orders in favor of LA County. Annual litigation reports from the LA County Counsel to the LA Board of Supervisors for the fiscal years 2005-6 and 2006-7 show that, during such years, LA County judges did not decide a single case against LA County. (See such documents as part of pleadings submitted to the Court as part of the contempt case.)

In this case, Judge Yaffe has refused to recuse himself in a contempt proceeding in order to enforce the illegal and void 1/8/08 Order against Petitioner he made in favor of LA County and its co-applicant, Del Rey Shores Joint Venture and Del Rey Shores Joint Venture North ("Del Rey Shores") for an Environmental Impact Report (EIR). Such Order was made without jurisdiction over Petitioner, without notice to Petitioner, and without Petitioner being present at the hearing.

In the contempt proceeding, Petitioner challenged the Order and the void Judgment ensuing from such Order. Such challenge is specifically allowed in a contempt proceeding when the contempt proceeding is brought to enforce a judgment or order.

Petitioner also defended against the charge of attacking the integrity of the Court (Judge Yaffe) and attacking the integrity of the LA Superior Court based on the demonstrated action of taking payments from a party and not declaring such violated an "implied or intangible right to honest services". (18 USC §§ 1341, 1343, 1346)

Petitioner was charged with 16 separate counts of contempt. Petitioner was found "not guilty" on 14 counts, including the counts of attacking the integrity of the court (Judge Yaffe) and the LA Superior Court. Petitioner was found "guilty" on 2 counts, which were refusing to answer questions about his assets in a judgment debtor hearing, and practicing law and holding himself out to practice law. (See Transcript of 1/22/09 and Minute Order of 1/22/09.) The 3/4/09 Judgment does not conform to the Transcript or the Minute Order as to the specific counts upon which Petitioner was found guilty.

This is a clear case of a denial of due process. The facts and claims in the Petition are not contested, and the U.S. Supreme Court cases are clear in the principles set forth therein: that there must be "an appearance of justice," and that a judge who takes money from a party must recuse himself from the case, as to do otherwise would compromise the integrity of the court.

The Court is respectfully reminded that even Justice Scalia, in defending his duck hunting trip with Vice President Cheney, stated that the party before the court was not "Dick Cheney", but the Office of the Vice President. He argued that separation of the identity of the individual from the office preserves the integrity of the court.

As shown in Petitioner's brief to the California Supreme Court in his Petition for Writ of Habeas Corpus, the taking of money by a judge who does not "throw the case" is still

corrupt. Justice Posner of the 7th Circuit stated in his remarks relating to Sir Francis Bacon that the judge who does not fulfill the "bargain" after he has taken the money is equally as corrupt as the judge who takes the money and fulfills the "bargain". (See Petitioner's brief to California Supreme Court, filed with the Petition.)

In Judge Yaffe's case, (as well as the other LA Superior Court judges), he took the money from LA County and made an order in LA County's favor. He then refused to recuse himself and presided over the contempt proceeding to judge his own wrongful conduct to be lawful. The violation of due process is clear.

Judge Yaffe held Petitioner in contempt. Petitioner has been incarcerated since March 4, 2009. Petitioner was taken to LA County jail immediately upon being sentenced and provided with a copy of the Judgment of Contempt.

Due to the refusal of the jail to provide Petitioner with paper and pencils or pro per status (all upon the order of Judge Yaffe), the filing of the Petition for Writ of Habeas Corpus was delayed for 16 days.

.....

IV. Magistrate Judge Violated 28 USC § 2243

28 USC § 2243 requires the Court to either issue the Writ or issue an order to show cause to the Respondent (Sheriff) "forthwith" upon receipt of the Petition. The Court received the Petition on 3/19/09. The Magistrate Judge violated the

statute by waiting 18 days, until 4/7/09, to issue her Order to the Sheriff to answer the Petition.

The statute requires the Sheriff to "certify the true cause of detention" within 3 to 20 days. The Sheriff responded within 14 days, on 4/21/09. He stated that he could not answer the Petition, and moved that he be dismissed or, in the alternative, that the Court direct the LA Superior Court and Judge Yaffe to answer and also direct Del Rey Shores to answer. By not answering, the Sheriff violated the statute and the Magistrate Judge violated the statute by not entering the Writ on 4/21/09.

Instead, on granting the Writ on 4/23/09, the Magistrate Judge directed the LA Superior Court, Judge Yaffe and Del Rey Shores to answer by 5/1/09. This act violated the statute's 20-day rule which required an answer no later than 4/27/09. Additionally, none of these entities had intervened to subject themselves to such Order.

The Magistrate Judge could justify her action only against the LA Superior Court and Judge Yaffe under 28 USC § 2254 on the grounds that Petitioner was subject to a 5-day sentence that he had not begun to serve for practicing law or holding himself out to practice law. If the Magistrate Judge does not use 28 USC § 2254 as a basis to direct the LA Superior Court and Judge Yaffe to answer, then their response must be stricken as they have not intervened in the case by seeking leave to do such.

.....

The Magistrate Judge never held a hearing as no facts set forth in the Petition were disputed. This placed the Magistrate Judge in the position that she had to accept as truthful all facts set forth and claimed in the Petition, that she could not use any fact from any other document if it contradicted any fact in the Petition. This is especially true of facts alleged in the 3/4/09 Judgment if they contradicted facts set forth in the Petition, as the LA Superior Court and Judge Yaffe never disputed the facts set forth in the Petition.

As of 5/1/09, the total record before the Magistrate Judge was as follows:

The 11/3/08 Order to Show Cause;
The Declaration of Joshua Rosen (which was not a trial exhibit);
The Trial Transcripts of 12/22/08, 1/22/09 and 3/4/09;
The Minute Orders of 12/22/08 and 1/22/09;
The Judgment and Remand Order of 3/4/09;
Trial Exhibits 1A, 9, 14, and 21; and
Senate Bill SBX2 11.

No other document was part of the "record." Any other document to which the Magistrate Judge referred in her Report must be disregarded as such documents were NOT part of the "record" and no one requested the Magistrate Judge to take judicial notice of any document. Her reference to any document outside the aforementioned documents was improper and a denial of due process. An example of such improper conduct is the Magistrate Judge's

reference to the current website of Petitioner, the State Bar's current website, including the 9/19/08 Opinion, the 3/27/08 Order Striking Notice of Disqualification, and any reference to a trial transcript other than those of 12/22/08, 1/22/09, and 3/4/09.

Further, the Magistrate Judge is precluded from citing to the 3/4/09 Judgment as Petitioner has challenged every fact and claim therein on a paragraph-by-paragraph basis, as shown by the Addendum to Paragraph 8 to the Petition. Since the Sheriff, the LA Superior Court and Judge Yaffe have not disputed Petitioner's facts and claims, Petitioner's version of the facts and claims prevail over those set out in the 3/4/09 Judgment.

Although the Magistrate Judge's report states that she did not refer to any submission by Del Rey Shores, the 5/1/09 Response of LA Superior Court and Judge Yaffe incorporated by reference a procedural history of the 4/28/09 response of Del Rey Shores which was stricken. Thus the procedural history of the response of LA Superior Court and Judge Yaffe must also be stricken as it incorporates the stricken Del Rey Shores procedural history. Additionally, the Del Rey Shores 5/8/01 First Ex Parte Application to Intervene was never served on Petitioner and the order allowing intervention was never signed and served. Thus any statement coming from such document must also be stricken.

Pursuant to 28 USC § 2243, due to the failure and refusal of the Sheriff, the LA Superior Court, Judge Yaffe and the Magistrate Judge to obey the statute, and the failure and refusal of

the Sheriff, the LA Superior Court and Judge Yaffe to dispute any facts and legal arguments set forth in the Petition, the Writ must be granted.

The Court's attention is respectfully directed to various parts of the Magistrate Judge's Report where she refers to the "record" without citation to any of the aforementioned documents. These unreferenced citations must be disregarded, as they are not part of the "record". Further, any reference to any part of the 3/4/09 Judgment which is disputed by the Petitioner must be disregarded as the LA Superior Court and Judge Yaffe did not dispute the facts set forth in the Petition and, in particular, those showing that the facts and conclusions of the 3/4/09 Judgment were wrong, as set forth in the Addendum to Paragraph 7 of the Petition. Other specific documents not in the record and not exhibits to the trial are the 4/15/08 Judgment, the 10/12/07 and 9/19/08 State Bar Decision, the 2/11/09 Supreme Court denial of review, and Exhibits B and C to the McCormick Declaration, in addition to those set forth hereinabove.

Even worse, when the Magistrate Judge cited to references outside of the "record," as she did at page 6, footnote 4, of her Report, she cited to the State Bar website and wrongly claimed that the 9/19/08 State Bar opinion on such website showed a similar pattern of conduct as the present case in five instances in the State Bar case.

Had the Magistrate Judge read the State Bar complaint and the underlying cases to which

she referred, she would have found that Petitioner was charged with "moral turpitude" for filing three Federal civil rights complaints, two appeals, two Writs, one motion to amend a complaint and CCP § 170.3 Objections, all of which actions were protected by the First Amendment and further specifically protected under the right to criticize the courts, as set forth in Garrison v. Louisiana, 379 US 64 (1964).

.....

V. Senate Bill SBX2 11 Immunity Convicts LA County Judges

Senate Bill SBX2 11 precludes judges from deciding cases where the county who gave them money is a party before them, as it confirms criminal guilt to their actions of having received payments from counties.

The Magistrate Judge's Report argues, at page 18, without any legal support, that Senate Bill SBX2 11 (California Gov't Code §§ 68220-68222) extends to allowing judges to hear cases of counties who pay them money. Senate Bill SBX2 11 caused the opposite effect. It gave retroactive immunity from criminal prosecution (which is greater than Fifth Amendment immunity), civil liability and disciplinary action to anyone who had paid or received the benefits and allowed judges who were receiving benefits as of 7/1/08 to continue receiving such until they leave the bench, and allowed the payments to all judicial officers to continue if the county chose to do so.

The Commission on Judicial Performance is challenging the constitutionality of Senate Bill SBX2 11 by asking for an Attorney General opinion (AG Opinion Request 09-401). It may be the first law giving such wide retroactive immunity.

Nothing in Senate Bill SBX2 11 mentions an exemption from a judge's duty to recuse himself of his duty to obey the U.S. Constitution. Under Article 6, Cl. 2, of the U.S. Constitution, all state court judges must obey the U.S. Constitution and the laws of the United States. Under Article 6, Cl. 3, all judges are bound by an oath to support the U.S. Constitution. The Fifth and Fourteenth Amendments both have due process requirements.

Senate Bill SBX2 11 provides retroactive immunity against criminal prosecution for judges who received county payments. By establishing such immunity, it confirms the criminality of such payments, as immunity cannot exist unless a criminal act already exists. The county payments cannot be deemed to be a new unlawful criminal act with retroactive effect as Article 1, Section 9, Subsection 3, of the U.S. Constitution prohibits the passage of any ex post facto law.

Contrary to the conclusion of the Magistrate Judge's Report, the effect of Senate Bill SBX2 11 is that judges who accepted county payments engaged in criminal acts by doing such. This criminal action would mandate their recusal in the case where the county was a party, under due process.

.....

VII. Magistrate Judge Ignored the Special Criminal Charge

The Magistrate Judge's Report ignored the special criminal charge in the OSC of practicing law or holding out to practice law in violation of B&P Code § 6126, which has a penalty of up to one year in jail, thus denying Petitioner a right to trial by jury.

At page 14, lines 3-7, the Magistrate Judge's Report states that Petitioner was not charged under B&P Code § 6126. However, a review of the OSC shows that the count charging Petitioner with practicing law or holding out to practice law cites violation of two statues: (1) B&P Code § 6126 and (2) B&P Code § 6127(b)

The charge under B&P Code § 6126 was never dismissed and the trial proceeded without a jury under the same count with B&P Code § 6127(b). There was no severance of the charges.

A motion to dismiss all charges was denied, including B&P Code § 6126.

The court denied Petitioner a right to trial by jury and then covered up such denial by omitting to refer to the charge of the violation of B&P Code § 6126 in the 3/4/09 Judgment. This action was denial of due process and contrary to clearly established Federal law.

The criminal trial required an independent prosecutor, not the lawyer for a party who was enforcing a judgment as part of the contempt trial. If it should have been prosecuted as a separate trial, the B&P Code § 6127(b) violation

would also have been tried before the jury to allow the jury to determine the facts of that violation in order to promote judicial efficiency and avoid double jeopardy of being convicted twice for the same crime.

.....

XII. Ground Six – Petitioner Was Not Notified of Evidence for the Contempt Hearing or of the Existence of the January 8, 2008 Hearing

The Writ must be granted because Petitioner was denied due process as he did not receive notice of the evidence to be used in the charge of practicing law or holding out to practice law. Further, the 1/8/08 Order was entered without jurisdiction over Petitioner, without notice to Petitioner, and without Petitioner's presence at the hearing, thus the Order is void, and all orders by Judge Yaffe based on such void Order are also void.

The Magistrate Judge's Report did not address Ground Six, which was set forth at Page 7 of the Addendum to Paragraph 7, and which incorporated the Brief and Memorandum to the California Supreme Court. This is another indication that the Magistrate Judge did not fully read the Petition and attached exhibits and addenda.

In particular, Ground Six shows that the Declaration of Joshua L. Rosen did not inform Petitioner that the trial subpoenas, Petitioner's website, and the Memorandum of Costs were to

be used as evidence for the two charges of practicing law or holding out to practice law. Under California law, the Declaration is the "complaint" in the contempt proceeding. The Declaration was never amended, and Petitioner made objections to the documents at trial.

Ground Six also shows that the 1/8/08 Order was entered without jurisdiction over Petitioner, without notice to Petitioner and without Petitioner being present at the hearing; that the Order is void; and that all orders by Judge Yaffe based on such Order are also void.

.....

XIII. Ground Seven – Petitioner Denied Expeditious Hearing

The Writ must be granted because the acts shown at the trial occurred from February through June 2008, and the OSC was not filed until 11/3/08, denying Petitioner the right to a reasonably expeditious hearing under the Fourteenth Amendment.

The Magistrate Judge's Report did not address Ground Seven, which was set forth at page 7 of the Addendum to Paragraph 7. This is another indication that the Magistrate Judge did not fully read the Petition.

.....

CONCLUSION

By the time of the 7/6/09 response date to the Magistrate Judge's Report, Petitioner will

have been unlawfully incarcerated for over four months since March 4, 2009. This unlawful incarceration will cease if this Court follows the law, immediately grants the Writ upon receipt and review of this Objection and Memorandum, and frees Petitioner.

As shown herein, the Magistrate Judge violated 28 USC § 2243 from the outset of this proceeding by not issuing the OSC "forthwith". Had she issued such on 3/20/09, as required, and given the Sheriff fourteen days to answer, as she later did, the Writ would have been granted on 4/3/09. The Sheriff violated 28 USC § 2243 by not certifying the reason for Petitioner's incarceration and not answering. Instead, the Magistrate Judge waited until 4/7/09 to issue her Order, did not issue the Writ on 4/21/09 when the Sheriff did not answer, and unlawfully directed the LA Superior Court, Judge Yaffe, and Del Rey Shores to answer by 5/1/09.

None of those entities had sought leave to intervene, nor had any of them been named as interested parties by the Sheriff on his Statement of Interested Parties. Further, the date of 5/1/09 exceeded the 20-day limitation under 28 USC § 2243, under which the last day to answer was 4/27/09.

Del Rey Shores responded on 4/28/09. The Magistrate Judge struck their response. A later First Ex Parte Application to Intervene was not served on Petitioner, and no order to intervene was entered.

The LA Superior Court and Judge Yaffe responded on 5/1/09. They did not respond or

answer to any of the grounds in the Petition; they only stated that Petitioner was incarcerated to "coerce" him to answer questions and that he was not incarcerated for practicing law or holding himself out to practice law.

Had they disputed any facts or claims in the Petition, the Magistrate Judge was required to hold a hearing by 5/6/09 with Petitioner present to allow him the opportunity to deny the claims in the "return" and add additional facts, unless for good cause additional time is allowed for the hearing, as set forth in 28 USC § 2243.

Since no facts or claims were disputed, the Writ should have been granted no later than 5/1/09.

Still, the Magistrate Judge did nothing. On 5/8/09, Petitioner replied to the LA Superior Court and Judge Yaffe filing. The Magistrate Judge "struck" Petitioner's reply for lack of an "original signature". The reply was again filed on 5/14/09. In the meantime, on 4/9/09, Petitioner had filed an Ex Parte Application for Immediate Release Pending Decision on the Writ. Proper notice had been given. The Sheriff never filed a substantive opposition, nor did the LA Superior Court and Judge Yaffe. Despite this lack of opposition, the Magistrate Judge never granted the Ex Parte Application.

On 5/29/09, with all papers filed and no substantive opposition to the Writ and no granting of the Writ, Petitioner attempted to filed a second Petition for Writ of Habeas Corpus against the District Court for violation of due process and violation of 28 USC § 2243. The

District Court refused to file such. Petitioner then filed it with the 9th Circuit, who accepted it as a Writ of Mandate/Prohibition on June 3, 2009. Subsequent thereto, at 5:00 p.m. on Friday, 6/12/09, the Magistrate Judge issued her Report. Prior thereto on the same day, Petitioner had filed a Notice of the Supreme Court's decision in *Caperton*, supra. Courtesy copies of such Notice had been served a day earlier, on Thursday 6/11/09, on the Magistrate Judge and this Court. The Magistrate Judge therefore knew of the *Caperton*, supra, decision and its direct relevance and precedent on the issues raised in the Petition before she filed her Report. Instead, the Notice was "entered" in the docket as of 6/16/09 and this latest U.S. Supreme Court precedent was ignored.

.....

Dated 25th day of June, 2009

Respectfully Submitted

/s/_____

Richard I. Fine
In Pro Per

Senate Bill No. 11

An act to add Sections 68220, 68221, and 68222 to the Government Code, relating to judges.

[Approved by Governor February 20, 2009. Filed with Secretary of State February 20, 2009.]

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:
(a) It is the intent of the Legislature to address the decision of the Court of Appeal in Sturgeon v. County of Los Angeles (2008) 167 Cal.App.4th 630, regarding county-provided benefits for judges.
(b) These county-provided benefits were considered by the Legislature in enacting the Lockyer-Isenberg Trial Court Funding Act of 1997, in which counties could receive a reduction in the county's maintenance of effort obligations if counties elected to provide benefits pursuant to paragraph (*l*) of subdivision (c) of Section 77201 of the Government Code for trial court judges of that county.
(c) Numerous counties and courts established local or court supplemental benefits to retain qualified applicants for judicial office, and trial court judges relied upon the existence of these longstanding supplemental benefits provided by the counties or the court.

SEC. 2. Section 68220 is added to the Government Code, to read:

68220. (a) Judges of a court whose judges received supplemental judicial benefits provided by the county or court, or both, as of July 1, 2008, shall continue to receive supplemental benefits from the county or court then paying the benefits on the same terms and conditions as were in effect on that date.

(b) A county may terminate its obligation to provide benefits under this section upon providing the Administrative Director of the Courts and the impacted judges with 180 days' written notice. The termination shall not be effective as to any judge during his or her current term while that judge continues to serve as a judge in that court or, at the election of the county, when that judge leaves office. The county is also authorized to elect to provide benefits for all judges in the county.

SEC. 3. Section 68221 is added to the Government Code, to read:

68221. To clarify ambiguities and inconsistencies in terms with regard to judges and justices and to ensure uniformity statewide, the following shall apply for purposes of Sections 68220 to 68222, inclusive:

(a) "Benefits" and "benefit" shall include federally regulated benefits, as described in Section 71627, and deferred compensation plan benefits, such as 401(k) and 457 plans, as described in Section 71628, and may also include professional development allowances.

(b) "Salary" and "compensation" shall have the meaning as set forth in Section 1241.

SEC. 4. Section 68222 is added to the Government Code, to read:
68222. Nothing in this act shall require the Judicial Council to increase funding to a court for the purpose of paying judicial benefits or obligate the state or the Judicial Council to pay for benefits previously provided by the county, city and county, or the court.

SEC. 5. Notwithstanding any other law, no governmental entity, or officer or employee of a governmental entity, shall incur any liability or be subject to prosecution or disciplinary action because of benefits provided to a judge under the official action of a governmental entity prior to the effective date of this act on the ground that those benefits were not authorized under law.

SEC. 6. The Judicial Council shall report to the Senate Committee on Budget and Fiscal Review, the Assembly Committee on Budget, and both the Senate and Assembly Committees on Judiciary on or before December 31, 2009, analyzing the statewide benefits inconsistencies.

SEC. 7. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.